

89-1306

Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CONSTRUCTION ENGINEERS, INC.,

ASSOCIATED GENERAL CONTRACTORS OF
AMERICA, ARKANSAS CHAPTER, MICHAEL
SUTTERFIELD AND CATHERINE N. RUSHING,

Petitioners

v.

THE CONWAY CORPORATION,

JIM BREWER AND BENNIE J. MCCOY,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Supreme Court of Arkansas deny petitioners a fair trial by relying upon proffers of proof of respondents as evidence in the case to support new fact findings and reverse the trial court's holding and dismiss the case?
2. Did the Arkansas Supreme Court deny petitioner its constitutional right to fair trial and legal representation by accepting proffers of proof as evidence when the proffers were made after conclusion of the trial and without right to object or cross examine?

PARTIES TO THE PROCEEDINGS

**Construction Engineers, Inc.—Petitioner
Associated General Contractors of America,
Arkansas Chapter**

Michael Sutterfield and Catherine N. Rushing

The Conway Corporation—Respondent

James Brewer

Bennie J. McCoy

John Doe I, John Doe II

Larry Grady

Frank Robins, III

Lou Gardy

Bill Pate

Bob Clifton

Leo Crafton, III

Arkansas Water Managers Association

Petitioners believe that Respondents M. D. Limbaugh Construction Company, John Doe, I, John Doe, II, Larry Graddy, Frank Robins, III, Lou Gardy, Bill Pate, Bob Clifton, as members of the Board of Directors of the Conway Corporation, and Arkansas Water Managers Association have no personal interest in the outcome of this petition. They were parties to injunctive relief and to issues no longer present and not subject to this petition for writ.

Designation of Corporate Relationships—Construction Engineers, Inc., filing this Petition for Certiorari as appellant in this proceeding states that: This is its original Designation of Corporate Relationships. Construction Engineers, Inc., is not owned by any parent corporation. Construction Engineers, Inc., does not have an ownership interest in any subsidiaries. Construction Engineers, Inc., does not have any affiliates. Dated February 7, 1990.

TABLE OF CONTENTS

Questions Presented	i
Parties to Proceedings	ii
Table of Contents	iv
Table of Authorities	v
Opinions Below	vi
Jurisdictional Statement	vi
Constitutional and Statutory Provisions Involved . .	vii
Statement of the Case	viii
Reasons for Granting the Writ	1
Appendix	
Substituted Opinion, Arkansas Supreme Court	A-1
Original Arkansas Supreme Court Opinion	A-16
Finding of Liability of Chancellor of Pulaski County Chancery Court, First Division, July 6, 1987, Case No. 3687	A-31
Finding of Damages of Chancellor of Pulaski County Chancery Court, First Division, July 22, 1988, Case No. 3687	A-42
Letter and Proffer of Proof	A-46
Petition for Rehearing	A-80

TABLE OF AUTHORITIES

Cases:

- Adington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60
L.Ed.2d 323 (1979) 3, A-81
- Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14
L.Ed.2d 1187 (1905) 2, A-81
- Bagby v. Beal*, 439 F.Supp. 1257 (M.D. Pa. 1977),
vac. as moot 606 F.2d 411 (3d Cir. 1979) . . 3, A-82
- Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281
U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107
(1930) 2, A-81
- Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719
(4th Cir. 1961), *cert. den.* 368 U.S. 825, 82
S.Ct. 44, 7 L.Ed.2d 1981 3, A-82
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898 (5th Cir. 1964) 3, A-81
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(3d Cir. 1965) 3, A-82
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- Looper v. Madison Guaranty Savings & Loan
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(1987) A-88, A-89
- U.S. v. Dinitz*, 538 F.2d 12.4 (5th Cir. 1976), *cert.
den.* 429 U.S. 1104, 77 S.Ct. 1133, 51 L.Ed.2d
556 (1977) 3, A-82

Constitutional and Statutory Provisions:

- United States Constitution, Amendment 14 . . . 17, A-81
- 42 U.S.C. §1983 17, A-81

OPINIONS BELOW

Conway Corporation, et al. v. Construction Engineers, Inc.,
Substituted Opinion (Ark. S.Ct. 89-34, December
11, 1989.)

Conway Corporation, et al. v. Construction Engineers, Inc.,
300 Ark. 225, —S.W.2d— (1989).

Conway Corporation, et al., v. Construction Engineers,
Inc., Pulaski County Chancery Court, First
Division, The Honorable Lee Munson, Pulaski
Chancery No. 3687, July, 1987.

Conway Corporation, et al., v. Construction Engineers,
Inc., Pulaski County Chancery Court, First
Division, The Honorable Lee Munson, Pulaski
Chancery No. 3687, July 22, 1988.

JURISDICTIONAL STATEMENT

This Petition for Writ of Certiorari is founded upon a denial by the Arkansas Supreme Court of petitioner's right to fair trial. Said Court is the highest court of the State. The date of the judgment or decree, being a substituted opinion, is December 11, 1989. It is the Court's opinion on rehearing from a decision rendered on October 30, 1989. It is the action of the Arkansas Supreme Court in determining a case *de novo* on appeal that gave rise to the denial of constitutional

rights. The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protections of the laws.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section,

any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In an appeal before the Arkansas Supreme Court from a decision of a chancery court, the Arkansas Supreme Court considered a written proffer of proof, a document not presented at the hearing before the chancellor, as evidence in the case on appeal. The court also considered as evidence a proffer made during trial, without right to cross-examine or object. Because the appeal was from a chancery court, the Arkansas court considered the case *de novo*, accepted the proffers of proof as evidence and reversed the chancellor and dismissed the case. A Petition for Rehearing was filed asserting the Arkansas Supreme Court's action violated Petitioner Construction Engineers, Inc.'s (CEI) right to fair trial as protected by the Fourteenth Amendment to the United States Constitution and by 42 U.S.C. §1983. The other petitioners joined in that petition. On consideration of the petitions for rehearing, the Arkansas court entered a substituted opinion which also reversed and dismissed. In the substituted opinion the court states it is not clear "... whether we may consider these proffered affidavits in our *de novo* review, but we will not do so here." In fact, the substituted opinion does rely upon the proffers of proof and cites facts to support

the court's action which appear only in the proffer or which came from the proffers.

Background

Petitioner CEI, the low bidder on a construction contract to improve a publicly owned water treatment plant, sued to enjoin the awarding of the contract to other than the low bidder or, in the alternative, for damages. The defendants were the Conway Corporation, a non-profit corporation which, under contract, operates utilities owned by the city of Conway; the corporation's directors; James Brewer, the general manager of the Conway Corporation; and Bennie J. McCoy, the engineer for the Conway Corporation for this construction project. Associated General Contractors of America, Arkansas Chapter was permitted to intervene as a full party on the side of Petitioner in order to protect industry rights. Michael Sutterfield and Catherine N. Rushing were permitted to intervene as full parties as taxpayers and ratepayers to recover wasted construction funds by use of second-low bid for the construction project and to protect future ratepayer rights. In a bifurcated trial, the chancellor determined, following the liability portion of the trial, the defendants were in fact liable, an injunction should not issue and the matter should be set for trial on damages. Included in the chancellor's fact findings were findings of bad faith on the part of Conway Corporation, its manager Brewer and its engineer McCoy, which findings were

relevant to issues of lack of good faith to reject the low bidder and to tortious interference with business expectancy. At the subsequently held trial on damages, the chancellor determined damages in the amount of \$194,295.00. After conclusion of the trial on damages and some two or three weeks later, defendants, Conway Corporation and Jim Brewer, among others, submitted a proffer of proof with multiple parts on the issue of liability, such proffer being by letter containing the proffers sent to the chancery clerk's office and to counsel.

In its first opinion reversing the chancellor and dismissing the case, the court stated:

Some of the evidence referred to was not presented at the hearing before the chancellor, but was proffered at a later time. There was some confusion over the subject matter of the hearing, and the appellants understandably thought it concerned injunctive relief only. In fact, the chancellor excused appellant McCoy from the hearing, saying the issue of his liability would not be reached. When the chancellor ruled against the appellants on the issue of liability for damages, they proffered additional evidence. Appellate review of equity cases is *de novo* and properly excluded evidence may be considered. *McCoy Farms, Inc. v. J & M McKee*, 263 Ark. 20, 563 S.W.2d 409, *cert. den.*, 439 U.S. 862 (1978).

Although the Court mentions confusion about the nature of the liability trial regarding McCoy, it is not the proffer of McCoy that the court relied upon. Rather it is the proffer of Conway Corporation, James Brewer and the other defendants which the court treated as evidence on appeal.

After considering the petition for rehearing the court indicates in its substituted opinion, it is not relying upon the proffer. However, it clearly continues to do so. In its substituted opinion, the court states three factors which it felt were crucial to the chancellor's decision. The first was the finding that engineer McCoy's investigation was cursory and biased, that negative information had been solicited and the credibility findings against the witness. The second factor said to be crucial in the chancellor's finding was the chancellor's finding that CEI had done prior satisfactory work for Conway Corporation. The finding was significant because not only had the chancellor found a prior satisfactorily performed construction project for Conway Corporation, it was upon the same water treatment plant as was under litigation and had followed the time CEI had constructed a school building some years earlier and had encountered difficulties which defendants were relying upon to justify not using CEI on the project. The third factor said to be crucial was the general manager had decided, even before bids were open, not to award the contract to CEI.

In demonstrating what the Arkansas Supreme Court found to be clear error on the part of the chancellor, the Arkansas court stated with regard to the second factor enumerated as crucial to the chancellor's finding, that CEI was only a sub-contractor on that construction project.

Specifically, the Court stated:

One job involved the same water treatment plant, but did not require CEI to perform as a general contractor, only a subcontractor on a job costing less than \$35,000.00.

The support for the Arkansas court's findings is the proffer of proof, the particular portion being testimony that defendant Brewer would supposedly testify to as follows: "... It [CEI] was more in the posture of a subcontractor on this project, since the Conway Corporation was functioning as its own general contractor." [Bracketed material added.] The proffer thus became evidence to demonstrate the chancellor's finding was clearly erroneous. The testimony in the record does not support the finding, but contradicts it.

In discussing the first factor which was said to be crucial to the chancellor's finding, which deals with the investigation of engineer McCoy, the court defends the credibility of the engineer's notes with which he had been impeached and states: "It is also important that the

notes containing the information were written by McCoy for his own personal use in preparing for a deposition in the case." No testimony appears in the record to support this finding. Neither does any statement appear in the proffers of proof to support the finding.

In its general findings, the Arkansas court found that "According to Brewer's information . . ." there had been serious problems with the school CEI had built in 1981-1982 including problems with plumbing, cabinet work and windows as a result of faulty construction. These matters are set forth in the portion of the proffer which contains additional statements Brewer would relate if allowed to testify further in the matter. The statements are absent from the record and the abstract of Brewer's testimony, which abstract was prepared by counsel for the Conway Corporation, Brewer, McCoy and the other defendants. It is obvious the proffers of proof, originally relied upon by the Arkansas court, are still being relied upon by that court and are having a direct effect upon its decision in the case.

As part of its general findings, the Arkansas Supreme Court found that the board of Conway Corporation was concerned with the ability of CEI to complete the project: "After hearing Brewer's information and recommendations, the members were unanimous in their conviction that the job could be completed on time with Limbaugh, but not with CEI."

None of the board members presented at trial so testified. A review of the abstract of their testimony and the record does not support the court's finding. However, while the portion of the proffer of proof containing additional testimony Jim Brewer would allegedly testify to, does not directly in its language support the fact finding of the Arkansas court, the fair inference from the proffer of proof does support the fact finding. It demonstrates that the proffer of proof is in fact appearing throughout the court's opinion, although a direct quotation from the proffer cannot always be found.

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SUTTERFIELD AND CATHERINE N. RUSHING,
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v.
THE CONWAY CORPORATION,
JIM BREWER AND BENNIE J. MCCOY,
Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS**

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:

REASONS FOR GRANTING THE WRIT

1. Did the Supreme Court of Arkansas deny petitioners a fair trial by relying upon proffers of proof of respondents as evidence in the case to

support new fact findings and reverse the trial court's holding and dismiss the case?

2. Did the Arkansas Supreme Court deny petitioner its constitutional right to fair trial and to legal representation by accepting proffers of proof as evidence when the proffers were made after conclusion of the trial and without right to object or cross examine?

Petitioners were denied the right to a fair trial by the Arkansas Supreme Court's action reversing and dismissing petitioners' causes of action, after trial *de novo*, with the court's action being based upon proffered testimony. No opportunity to object to inadmissible testimony or for cross examination existed as to proffered testimony. The court thus prevented CEI and petitioners from cross examining witnesses, and from having the opportunity to object to inadmissible testimony. Petitioners were denied their right to effective counsel by the lack of opportunity to object, to cross examine, or participate in any manner with regard to matters proffered below and then relied upon by the court. These rights are fundamental rights which are protected by the Fourteenth Amendment and 42 U.S.C. §1983. Denial of these rights is a denial of both substantive and procedural due process rights. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930); *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 1187 (1905)

(fundamental requirement of due process is opportunity to be heard at meaningful time and meaningful manner); *Adington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (function of legal process is to minimize risk of erroneous decisions); *Council of Federal Organizations v. Mize*, 339 F.2d 898 (5th Cir. 1964) (right of litigant to be heard is one of fundamental rights of due process); *Derewecki v. Pennsylvania R.R. Co.*, 353 F.2d 436 (3d Cir. 1965) (denial of right of cross examination of available witness deprives litigant of due process); *Ellis v. Capps*, 500 F.2d 225 (5th Cir. 1974) (denial of right of inquiry such as bias and prejudice of party is repugnant to principle of fair trial); *See, U.S. v. Dinitz*, 538 F.2d 12.4 (5th Cir. 1976), *cert. den.* 429 U.S. 1104, 77 S.Ct. 1133, 51 L.Ed.2d 556 (1977) (refusal to hear party by counsel in civil or criminal case constitutes denial of a hearing and therefore due process); *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719 (4th Cir. 1961), *cert. den.* 368 U.S. 825, 82 S.Ct. 44, 7 L.Ed.2d 1981 (preparation of court's opinion by litigant's counsel without notice to opposing side amounts to denial of due process); *Bagby v. Beal*, 439 F.Supp. 1257 (M.D. Pa. 1977), *vac. as moot*, 606 F.2d 411 (3d Cir. 1979) (due process includes a reasonable opportunity to be heard, including a statutory scheme which is intelligible to persons affected by it.)

The proffered testimony of respondents, Conway Corporation, Jim Brewer and all defendants except McCoy consisted of several written statements of

different people, some of whom had testified in the case. Only the proffered testimony of Dan Nabholz was tendered during trial and that proffer on liability occurred during the damage portion of a bifurcated trial. No opportunity to cross examine or object to inadmissible testimony was given because only a proffer was being made. During the trial to determine liability, respondents Conway Corporation and James Brewer participated fully. Upon concluding their defense on liability, these respondents rested. The trial court ruled on the liability issue. Only after having the opportunity to know the basis for the liability ruling of the trial court, an opportunity to see after the fact what issues might be deemed most significant, did respondents Conway Corporation and Jim Brewer proffer the testimony of Dan Nabholz and the written proffer consisting of affidavits relied upon by the Arkansas Supreme Court. It should be noted that the proffer of all respondents except McCoy were presented **after all** testimony in the **entire trial** was concluded. The Arkansas Supreme Court's allowance of this untimely evidence and reliance upon it without permitting cross examination, or the right to object, and to the exclusion of the trial testimony, deprived petitioners of the fundamental right to a fair trial.

Because the proffer was untimely, and because it was by proffer, and because all testimony was concluded and the proffers were not presented until the trial was concluded, there was no opportunity for cross

examination, for objection such as to hearsay, or for any participation by counsel for petitioners. Because the Arkansas Supreme Court now credits this proffered testimony, these omissions seriously prejudice petitioners' right to a fair trial. For example, the proffer of Elaine Goode, accepted by the court as true, contains hearsay and hearsay within hearsay. Her testimony would not have been admissible if she had appeared in a timely manner and attempted to testify. Such error demonstrates the seriousness of the deprivation of due process. The proffer offers more testimony of Carl Stewart on the issue of liability when, in fact, Mr. Stewart had already testified and given testimony damaging to respondents on cross examination. The proffer, made after conclusion of the trial, is an untimely attempt to bolster trial testimony without allowing further cross examination. For the court on trial *de novo* to rely upon such proffers and to allow its admission into evidence as evidence post trial has resulted in an entirely new trial in which petitioners were not allowed to participate. The proffer of Jim Brewer offers more testimony on the issue of liability although respondent Brewer had testified during the trial. This time, however, the proffer asserts hearsay and further summaries of his version of events without cross examination or the opportunity to object to hearsay. The proffers of the other individuals in the post trial proffer were, of course, untimely and offered on the issue of liability. No explanation was given for not offering this testimony in a timely manner during the liability portion of the trial. Some of the proffers are

based on hearsay, some express opinions upon the ultimate conclusion of good faith/bad faith; however, most are contrary to respondent Brewer's testimony as to whom he discussed problems with and what he was told. These defects demonstrate the extent of harm to petitioners' right to due process, such harm resulting in a complete denial of a right to procedural and substantive due process caused by the lack of opportunity to object, the lack of opportunity to cross examine and the lack of meaningful participation of counsel to challenge the evidence or offer counter testimony, or to impeach the testimony.

In finding the chancellor's findings of bad faith clearly erroneous, the effect of the court's reliance upon the untimely proffers of proof conclusively demonstrates the prejudice to petitioners. At the same time, the proffers of proof contradicted the evidence in the case which supports the chancellor's findings. For example, the chancellor found CEI was qualified to build the project. This finding is not challenged. Respondent McCoy testified the qualify of CEI's work was not being questioned. This testimony is directly contrary to the allegations of poor workmanship in the proffer of proof. Further, the allegations of poor workmanship in the proffer is contrary to the school architect's testimony, which architect testified for the respondents. He placed the blame for problems on his own specification and on trouble with sub-contractors. He did not state poor workmanship was one of the problems.

Most significant is the trial testimony of respondent Brewer:

My concerns with regard to CEI were based on my knowledge and understanding of the problems they had with coordinating work of sub-contractors on the Mattison School project and some problems that seemed to be apparent with the Morrilton sewer project. I read newspaper articles and discussed through the years with members of the school board and superintendent of the school. (Ab. 312) (Emphasis added.)

This testimony is inconsistent with the matters set forth in the proffer. No mention at trial was made of discussion with city council members or a mayor as is set forth in the proffer. The plain truth of the matter is that the proffer is so full of hearsay and of information that cannot be substantiated, the testimony would not have been admissible in large part, and any remaining parts would have been incredible.

CONCLUSION

The Court should review this case because the issue of right to fair trial is a fundamental right of substantial public importance and concern. It is respectfully submitted that writ of certiorari should issue.

Respectfully submitted,

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Appendix

SUPREME COURT OF ARKANSAS

No. 89-34

Opinion Delivered December 11, 1989

Conway Corporation, et al.,
Appellants

vs.

Construction Engineers, Inc.,
Appellee

Appeal from Pulaski Chancery Court, First Div.
Lee Munson, Chancellor
(86-3687)

**SUBSTITUTED OPINION.
REVERSED AND DISMISSED.**

DARRELL HICKMAN, *Associate Justice:*

Construction Engineers, Inc. (CEI), the low bidder on a municipal construction contract, sued the appellants for wrongfully rejecting its bid and awarding the contract to the second lowest bidder, Limbaugh Construction Company. Appellants are the Conway Corporation, a nonprofit corporation which, under contract, operates the utilities owned by the City of Conway; the Corporation's directors; Jim Brewer, the general manager of the Corporation; and Bennie McCoy, the engineer on the construction project. The

chancellor found the appellants wrongfully rejected CEI's bid. Because that finding was clearly erroneous, we reverse and dismiss this case.

CEI filed suit in Pulaski County Chancery Court on August 20, 1986, seeking injunctive and declaratory relief and damages.¹ The complaint alleged the contract was awarded in violation of the law, and that the appellants had conspired to interfere with CEI's business expectancy. The appellants answered that they were immune from tort liability, and that they had exercised good faith discretion in carrying out their public duties.

After the lawsuit was filed, and without objection by the appellants, CEI requested a special master to hear evidence on the issue of temporary injunctive relief. In determining whether CEI had a probability of success on the merits, the master found there was a reasonable basis for the rejection of CEI's bid and that the appellants had acted in good faith.

Those findings were presented to the chancellor. He did not immediately accept or reject the findings, but held a hearing to receive additional evidence. He concluded that an injunction should not issue because construction on the project was already 43% complete, but he rejected the remainder of the

¹The suit was filed in Pulaski County because McCoy, the engineer, is a resident there.

master's findings. He determined that the Corporation's rejection of CEI's bid was arbitrary and without cause and that Brewer and McCoy acted in bad faith in urging rejection of the bid. The appellants were held jointly and severally liable for \$194,295, the profit CEI would have made had it received the contract. Ratepayers, who had intervened with an illegal exaction suit, were awarded \$66,100 difference in CEI's and Limbaugh's bids.

The appellants seek reversal on a myriad of issues, including immunity, lack of jurisdiction, due process, improper remarks by the chancellor, and insufficiency of the evidence. CEI cross-appeals, asking for attorney fees, pre-judgment interest and punitive damages. *Amicus curiae* briefs have been filed by the Arkansas Water Managers Association and by the Associated General Contractors of America. The case is resolved most readily by examining the evidence and the chancellor's findings.

In May of 1986, the Conway Corporation solicited bids on the expansion of Conway's water treatment plant. Jim Brewer asked Bennie McCoy to contact CEI and dissuade it from bidding on the project. The basis for Brewer's concern was CEI's performance in 1980-81 as general contractor on another local project, the construction of an elementary school for the Conway School District. According to Brewer's information (which was received from his close friend and school superintendent Carl Stuart, as well as from

local newspaper articles), there had been serious problems with the school's plumbing, cabinetwork, and windows as a result of faulty construction. When a dispute arose among CEI, the architect, the school district and the subcontractors as to who was responsible for the problems, a lawsuit was brought, resulting in lengthy delays. The school's problems were apparently well known throughout Conway and Brewer described the project as a "fiasco."

Following Brewer's instructions, McCoy called Steve and Danielle Smith, the husband and wife engineers who owned CEI, on May 19 and May 29 and wrote them on June 3 to express Brewer's reservations about their ability to perform the work. He told Steve Smith, "I understand you got a bit of a black eye in the Conway community over the Conway school you built." Smith admitted he had gotten "cross-ways" with the architect on that project. McCoy also asked about rumors that CEI was behind schedule on one of its current projects, the construction of a sewage plant in nearby Morrilton. Smith said he was behind because of late equipment deliveries but expected that his completion schedule would be extended. CEI was not dissuaded from submitting a bid.

Bids were opened on June 26. CEI's bid was lowest and Limbaugh's the next lowest. Brewer immediately ordered McCoy to conduct a post-bid investigation of both CEI and Limbaugh (neither Brewer

or McCoy was familiar with Limbaugh). In the meantime, Brewer obtained legal advice on the propriety of awarding the contract to the second lowest bidder.

Between June 30 and July 3, McCoy spoke with various references who gave excellent reports on Limbaugh, but gave CEI, at best, mixed reviews. One reference reported that CEI did good, quality work, and CEI's surety gave a favorable report. But damaging references were given by the engineers on the Morrilton project who spoke of supervisory problems and a "paper war" which resulted when CEI missed a critical milestone, and by the architect on the Conway school who said the project was the worst he had ever experienced.

These matters were presented to the board of the Corporation at its next meeting. The board was concerned that the improvements be completed on time to avoid an anticipated water shortage. After hearing Brewer's information and recommendation, the members were unanimous in their conviction that the job could be completed on time with Limbaugh, but not with CEI. They also noted that, while CEI had never completed a project of this magnitude, Limbaugh had constructed ten water and sewage treatment plants in the past five years.

The first question we must answer is, did the Corporation have the discretion to award to the contract

to anyone other than the lowest monetary bidder? The answer is yes.

CEI and the Associated General Contractors rely on Ark. Code Ann. §§19-11-403 and 404 (1987), arguing that the Corporation had no discretion to award the contract to anyone other than the lowest bonded bidder. Section 19-11-403 provides that bids submitted on public construction contracts must be accompanied by a surety bond. Section 19-11-404 provides as follows:

All bidders being made responsible in the manner stated in §19-11-403, it shall be the duty of persons empowered to accept bids to accept no other bid than the lowest, except upon default of the lowest bidder.

The appellants urge the application of Ark. Code Ann. §22-9-203 (1987), which governs the award procedure on public improvement contracts, including municipal improvements costing over \$10,000. Section 22-9-203(d) provides that the awarding authority shall:

[O]pen and compare bids, and thereafter award the contract to the lowest responsible bidder, but only if it is the opinion of the authority that the best interests of the taxing unit would be served thereby.

We find the legislature did not intend §§19-

11-403 and 404 to apply to contracts like the one here. Numerous public contracts are specifically exempted from the requirements of those statutes under Ark. Code Ann. §19-11-402(b) (1987):

The provisions of this subchapter shall not be applicable to:

- (1) Highway maintenance and construction contracts;
- (2) Any contracts let by the Office of State Purchasing.
- (3) Any contracts let by the counties of this state;
- (4) State agency contracts for commodities and services subject to other appropriate law;
- (5) Cities and towns having boards of public affairs operating public utilities, auditoriums, airports, or other city owned properties; or
- (6) Commissions appointed by cities operating public utilities, auditoriums, airports, or other city owned properties.

In light of these many exceptions, it is apparent the legislature intended this law to apply only

to a limited class of public contracts. In fact, a recent amendment exempts any contract let by a municipality. See Ark. Code Ann. §19-11-402(b)(3) (Supp. 1987).

The statute particularly exempts contracts let by municipal utility commissions. Although the Conway Corporation is not, strictly in name, a utility commission, that is what it is; it performs the same duties as a commission in managing and operating a municipal waterworks. See Ark. Code Ann. §14-234-306 (1987).

Finally, §22-9-203 applies to specific types of public contracts—major repairs or alterations, erection of buildings or other structures, or permanent improvements, costing over a certain dollar amount. Since this specific statute governs the subject, its application is favored over the more general provisions of §§19-11-401 to 405. *Williams v. City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985).

We find the Corporation, under §22-9-203, had the discretion to reject CEI's bid so long as the rejection was for good cause and in good faith. *Worth James Constr. Co. v. Jacksonville Water Comm'n.*, 267 Ark. 214, 590 S.W.2d 256 (1979).

So, the next question we must answer is whether the chancellor's finding of bad faith is clearly erroneous. We find it is.

Chancery cases are tried *de novo* on appeal, but we will not reverse the chancellor's findings unless clearly erroneous, giving due deference to the chancellor's superior position in determining the credibility of the witnesses. *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984); ARCP Rule 52(a). In applying that standard of review in this case, it is important to remember that the master, not the chancellor, heard the testimony of appellant McCoy² and that the chancellor should accept the master's findings unless clearly erroneous. ARCP Rule 53(e)(2). Three factors were crucial to the chancellor's decision: (1) he called McCoy's investigation cursory and biased, and said that negative information had been deliberately solicited; he specifically questioned McCoy's truthfulness, saying his July 3 notes on CEI referred to incidents that did not happen until the following August; (2) between the time of the school project and this project, CEI had done satisfactory work on another job for the Corporation; and (3) there was evidence that Brewer had decided, even before the bids were opened, not to award the contract to CEI.

²There was some confusion over the subject matter of the hearing held by the chancellor. The appellants understandably thought it concerned injunctive relief only and McCoy was actually excused from the hearing. The only testimony he gave was at the hearing before the master. All appellants asked the chancellor for another opportunity to present evidence concerning their liability. The chancellor refused but allowed additional testimony to be proffered through affidavits. It is not clear whether we may consider those proffered affidavits in our *de novo* review, but we will not do so here. Our decision is based on the evidence considered by the master and the chancellor.

Bad faith consists of dishonest, malicious or oppressive conduct with a state of mind characterized by hatred, ill will or a spirit of revenge. *Stevenson v. Union Standard Ins. Co.*, 294 Ark. 651, 746 S.W.2d 39 (1988). The chancellor's determination that McCoy's investigation was biased and dishonest is not supported by the evidence. McCoy received both positive and negative comments on CEI and duly reported both. Nothing indicates he manufactured the negative comments or reported them in a manner that obscured the truth.

The allegation that McCoy's notes referred to an event that had not yet taken place is also unfounded. The notes show he spoke with an engineer on the Morrilton project on July 3 and was told that there were problems with a small structure erected by CEI. The chancellor was convinced by CEI's argument that problems with the structure did not occur until August 1, but Billy Joe Roper, a foreman on the project unequivocally testified he spoke with the engineer about problems with the structure *30 to 45 days before* August 1. If the engineer did mention the structure to McCoy (a fact which the engineer could not recall, but did not flatly deny), it could have happened on or before July 3. It is also important that the notes containing the information were written by McCoy for his own personal use in preparing for a deposition in this case.

The chancellor also referred to the fact that

CEI was allowed to bid on two Conway Corporation projects in 1984. One job involved the same water treatment plant, but did not require CEI to perform as a general contractor, only a subcontractor on a job costing less than \$35,000. The other project was construction of an office building for the Corporation. CEI was an unsuccessful bidder on that project, and Brewer testified he was not aware CEI had submitted a bid. It is clear that neither of these projects involved CEI operating as a general contractor on a crucial municipal project on which time was of the essence.

Finally, the chancellor found that Brewer made his decision to reject CEI's bid before any investigation took place. There is a reasonable basis for that finding. The efforts to dissuade CEI from bidding took place a month and a half before bids were opened. Brewer even used Limbaugh's bid figure in his budget tabulation, compiled on the day of the bid opening. But there is no evidence that this action was taken with any motive other than the desire to avoid the same delays and problems that plagued the last local municipal project on which CEI performed as a general contractor.

The record is simply void of any evidence that the Corporation, Brewer or McCoy acted with improper motives or with hatred, ill will or a spirit of revenge. Because the chancellor's findings were clearly erroneous, and because he gave no reason for rejecting the master's findings as clearly erroneous, we find the

Corporation did not exercise its discretion in bad faith. Therefore, the award to the ratepayers and the award of lost profits against the Conway Corporation are reversed.

This does not resolve the issue of Brewer's and McCoy's liability because bad faith need not be proven to recover for tortious interference with a business expectancy. *Walt Bennett Ford, Inc. v. Pulaski County Spl. School Dist.*, 274 Ark. 208, 624 S.W.2d 426 (1981), *supp. opinion on denial of rehearing*. However, the defendant may show his interference was privileged. Privilege means a defendant will not be liable if he acts, without bad faith, to protect the public interest or a third person to whom he stands in a relation of responsibility. The evidence, as stated above, shows Brewer and McCoy should have the benefit of the privilege. They acted without bad faith in the interest of those to whom they were responsible and should not be held liable for interference with a business expectancy.³ Therefore, the award of damages against them is reversed.

We do not reach the issue of whether the appellants are immune from liability as municipal agents or employees. *See Ark. Code Ann. §21-9-301 (1987);*

³We do not address the question of whether CEI had a valid business expectancy, nor do we decide whether Brewer and McCoy, as agents of the Corporation, interfered with CEI's contract with a "third party." *See Navarro-Monzo v. Hughes*, 297 Ark. 444, 763 S.W.2d 635 (1989).

Matthews v. Martin, 280 Ark. 345, 658 S.W.2d 374 (1983).⁴ Nor do we reach the question of whether the claim against appellant McCoy should have been transferred to circuit court. See *McCoy v. Munson*, 294 Ark. 488, 744 S.W.2d 708 (1988). Having reversed the award of damages, we do not address CEI's issues on cross-appeal.

One issue does merit discussion. This case was tried prior to our decision in *Klinger v. City of Fayetteville*, 297 Ark. 385, 762 S.W.2d 388 (1988). In *Klinger* an unsuccessful bidder sued the city for lost profits. We said the following:

We find the general rule to be that statutes requiring competitive bidding for government contracts are enacted for the benefit of the taxpayers rather than for the benefit of those who would sell goods and services to governmental entities. Although violation of a competitive bidding statute may create a right to an equitable remedy or mandamus, it does not give rise to a claim for damages. (Cites omitted.)

The appellants claim this language requires reversal of the award of damages against them.

⁴ Ark. Code Ann. §16-120-102 (Supp. 1987), which grants immunity to nonprofit corporations, was not in effect at the time this cause of action arose.

The appellee counters this argument by citing *Walt Bennett Ford, Inc. v. Pulaski Spl. School Dist.*, *supra*. There, a disappointed bidder sued to set aside a contract between the school district and the successful bidder and also sued various individuals for the tort of interference with a contract. We held that “an unsuccessful bidder does have standing to sue for alleged wrongs” in the bidding process.

Prior to the *Walt Bennett Ford* case, our law was that a disappointed bidder had no standing to sue for a violation of competitive bidding statutes. In *Bank of Eastern Ark. v. Bank of Forrest City*, 94 Ark. 311, 126 S.W. 837 (1910), and *Arkansas Democrat Co. v. Press Printing Co.*, 57 Ark. 322, 21 S.W. 586 (1893), we held that injunctive relief was not available to the unsuccessful bidder because he had no standing. Those cases were expressly overruled in *Walt Bennett Ford*. We held that the appellant, who had not asked for an injunction or lost profit damages, had standing to seek avoidance of the contract. We recognized the tort action against the individuals as being a separate and distinct cause of action in which standing was not an issue.

The two cases are not irreconcilable. An unsuccessful bidder may challenge the legality of the authority's action by way of injunctive or declaratory relief or mandamus for example, but he may not recover lost profit damages from the authority. Even so, according to *Walt Bennett Ford*, he is not prevented from

pursuing a tort action and damages against individual defendants, such as Brewer and McCoy in this case. But that statement is without regard to the question of immunity, which was not an issue in *Walt Bennett Ford*.

Reversed and dismissed

PURPLE, J., not participating.

SUPREME COURT OF ARKANSAS

No. 89-34

Opinion Delivered October 30, 1989

Conway Corporation, et al.,
Appellants

vs.

Construction Engineers, Inc.,
Appellee

Appeal from Pulaski Chancery Court, First Div.
Lee Munson, Chancellor
(86-3687)

REVERSED AND DISMISSED.

DARRELL HICKMAN, *Justice*:

Construction Engineers, Inc. (CEI), the low bidder on a municipal construction contract, sued the appellants for wrongfully rejecting its bid and awarding the contract to the second lowest bidder, Limbaugh Construction Company. Appellants are the Conway Corporation, a nonprofit corporation which, under contract, operates the utilities owned by the City of Conway; the Corporation's directors; Jim Brewer, the general manager of the Corporation; and Bennie McCoy, the engineer on the construction project. The chancellor found the appellants wrongfully rejected

CEI's bid. Because that finding was clearly erroneous, we reverse and dismiss this case.

CEI filed suit in Pulaski County Chancery Court on August 20, 1986, seeking injunctive and declaratory relief and damages.¹ The complaint alleged the contract was awarded in violation of the law, and that the appellants had conspired to interfere with CEI's business expectancy. The appellants answered that they were immune from tort liability, and that they had exercised good faith discretion in carrying out their public duties.

After the lawsuit was filed, and without objection by the appellants, CEI requested a special master to hear evidence on the issue of temporary injunctive relief. In determining whether CEI had a probability of success on the merits, the master found there was a reasonable basis for the rejection of CEI's bid and that the appellants had acted in good faith.

Those findings were presented to the chancellor. He did not immediately accept or reject the findings, but held a hearing to receive additional evidence. He concluded that an injunction should not issue because construction on the project was already 43% complete, but he rejected the remainder of the

¹The suit was filed in Pulaski County because McCoy, the engineer, is a resident there.

master's findings. He determined that the Corporation's rejection of CEI's bid was arbitrary and without cause and that Brewer and McCoy acted in bad faith in urging rejection of the bid. The appellants were held jointly and severally liable for \$194,295, the profit CEI would have made had it received the contract. Ratepayers, who had intervened with an illegal exaction suit, were awarded \$66,100 difference in CEI's and Limbaugh's bids.

The appellants seek reversal on a myriad of issues, including immunity, lack of jurisdiction, due process, improper remarks by the chancellor, and insufficiency of the evidence. CEI cross-appeals, asking for attorney fees, pre-judgment interest and punitive damages. *Amicus curiae* briefs have been filed by the Arkansas Water Managers Association and by the Associated General Contractors of America. The case is resolved most readily by examining the evidence and the chancellor's findings.

In May of 1986, the Conway Corporation solicited bids on the expansion of Conway's water treatment plant. Jim Brewer asked Bennie McCoy to contact CEI and dissuade it from bidding on the project. The basis for Brewer's concern was CEI's performance in 1980-81 as general contractor on another local project, the construction of an elementary school for the Conway School District. According to Brewer's information (which was received from his close friend and school superintendent Carl Stuart, as well as from

local newspaper articles), there had been serious problems with the school's plumbing, cablnetwork, and windows as a result of faulty construction. When a dispute arose among CEI, the architect, the school district and the subcontractors as to who was responsible for the problems, a lawsuit was brought, resulting in lengthy delays. The school's problems were apparently well known throughout Conway and Brewer described the project as a "fiasco."

Following Brewer's instructions, McCoy called Steve and Danielle Smith, the husband and wife engineers who owned CEI, on May 19 and May 29 and wrote them on June 3 to express Brewer's reservations about their ability to perform the work. He told Steve Smith, "I understand you got a bit of a black eye in the Conway community over the Conway school you built." Smith admitted he had gotten "cross-ways" with the architect on that project. McCoy also asked about rumors that CEI was behind schedule on one of its current projects, the construction of a sewage plant in nearby Morrilton. Smith said he was behind because of late equipment deliveries but expected that his completion schedule would be extended. CEI was not dissuaded from submitting a bid.

Bids were opened on June 26. CEI's bid was lowest and Limbaugh's the next lowest. Brewer immediately ordered McCoy to conduct a post-bid investigation of both CEI and Limbaugh (neither Brewer

nor McCoy was familiar with Limbaugh). Between June 30 and July 3, McCoy spoke with various references who gave excellent reports on Limbaugh, but gave CEI, at best, mixed reviews. One reference reported that CEI did good, quality work, and CEI's surety gave a favorable report. But damaging references were given by the engineers on the Morrilton project who spoke of supervisory problems and a "paper war" which resulted when CEI missed a critical milestone, and by the architect on the Conway school who said the project was the worst he had ever experienced.

In the meantime, Brewer sought guidance from the mayor and several city council members who advised him it would be a mistake to award the contract to CEI in light of the problems with the school project.² He also obtained legal advice on the propriety of awarding the contract to the second lowest bidder.

These matters were presented to the board of the Corporation at its next meeting. The board was concerned that the improvements be completed on time to avoid an anticipated water shortage. After hearing Brewer's information and recommendation, the

²Some of the evidence referred to was not presented at the hearing before the chancellor, but was proffered at a later time. There was some confusion over the subject matter of the hearing, and the appellants understandably thought it concerned injunctive relief only. In fact, the chancellor excused appellant McCoy from the hearing, saying the issue of his liability would not be reached. When the chancellor ruled against the appellants on the issue of liability for damages, they proffered additional evidence. Appellate review of equity cases is *de novo* and improperly excluded evidence may be considered. McCoy Farms, Inc. v. J&M McKee, 263 Ark. 20, 563 S.W.2d 409, cert. denied, 439 U.S. 862 (1978).

members were unanimous in their conviction that the job could be completed on time with Limbaugh, but not with CEI. They also noted that, while CEI had never completed a project of this magnitude, Limbaugh had constructed ten water and sewage treatment plants in the past five years.

The first question we must answer is, did the Corporation have the discretion to award to the contract to anyone other than the lowest monetary bidder? The answer is yes.

CEI and the Associated General Contractors rely on Ark. Code Ann. §§19-11-403 and 404 (1987), arguing that the Corporation had no discretion to award the contract to anyone other than the lowest bonded bidder. Section 19-11-403 provides that bids submitted on public construction contracts must be accompanied by a surety bond. Section 19-11-404 provides as follows:

All bidders being made responsible in the manner stated in §19-11-403, it shall be the duty of persons empowered to accept bids to accept no other bid than the lowest, except upon default of the lowest bidder.

The appellants urge the application of Ark. Code Ann. §22-9-203 (1987), which governs the award procedure on public improvement contracts, including municipal improvements costing over \$10,000. Section

22-9-203(d) provides that the awarding authority shall:

[O]pen and compare bids, and thereafter award the contract to the lowest responsible bidder, but only if it is the opinion of the authority that the best interests of the taxing unit would be served thereby.

We find the legislature did not intend §§19-11-403 and 404 to apply to contracts like the one here. Numerous public contracts are specifically exempted from the requirements of those statutes under Ark. Code Ann. §19-11-402(b) (1987):

The provisions of this subchapter shall not be applicable to:

- (1) Highway maintenance and construction contracts;
- (2) Any contracts let by the Office of State Purchasing.
- (3) Any contracts let by the counties of this state;
- (4) State agency contracts for commodities and services subject to other appropriate law;
- (5) Cities and towns having boards of public

affairs operating public utilities, auditoriums, airports, or other city owned properties; or

(6) Commissions appointed by cities operating public utilities, auditoriums, airports, or other city owned properties.

In light of these many exceptions, it is apparent the legislature intended this law to apply only to a limited class of public contracts. In fact, a recent amendment exempts any contract let by a municipality. See Ark. Code Ann. §19-11-402(b)(3) (Supp. 1987).

The statute particularly exempts contracts let by municipal utility commissions. Although the Conway Corporation is not, strictly in name, a utility commission, that is what it is; it performs the same duties as a commission in managing and operating a municipal waterworks. See Ark. Code Ann. §14-234-306 (1987).

Finally, §22-9-203 applies to specific types of public contracts—major repairs or alterations, erection of buildings or other structures, or permanent improvements, costing over a certain dollar amount. Since this specific statute governs the subject, its application is favored over the more general provisions of §§19-11-401 to 405. *Williams v. City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985).

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had the discretion to reject CEI's bid so long as the rejection was for good cause and in good faith. *Worth James Constr. Co. v. Jacksonville Water Comm'n.*, 267 Ark. 214, 590 S.W.2d 256 (1979).

So, the next question we must answer is whether the chancellor's finding of bad faith is clearly erroneous. We find it is.

Chancery cases are tried *de novo* on appeal, but we will not reverse the chancellor's findings unless clearly erroneous, giving due deference to the chancellor's superior position in determining the credibility of the witnesses. *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984); ARCP Rule 52(a). In applying that standard of review in this case, it is important to remember that some of the evidence we are considering is in the form of proffered affidavits; that the master, not the chancellor, heard the testimony of appellant McCoy and that the chancellor should accept the master's findings unless clearly erroneous. ARCP Rule 53(e)(2). Three factors were crucial to the chancellor's decision: (1) he called McCoy's investigation cursory and biased, and said that negative information had been deliberately solicited; he specifically questioned McCoy's truthfulness, saying his July 3 notes on CEI referred to incidents that did not happen until the following August; (2) between the time of the school project and this project, CEI had done satisfactory work on another job for the Corporation; and (3) there was evidence that

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The allegation that McCoy's notes referred to an event that had not yet taken place is also unfounded. The notes show he spoke with an engineer on the Morrilton project on July 3 and was told that there were problems with a small structure erected by CEI. The chancellor was convinced by CEI's argument that problems with the structure did not occur until August 1, but Billy Joe Roper, a foreman on the project unequivocally testified he spoke with the engineer about problems with the structure *30 to 45 days before* August 1. If the engineer did mention the structure to McCoy (a fact which the engineer could not recall, but did not flatly deny), it could have happened on or before July 3. It is also important that the notes containing the information were written by McCoy for his own personal

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The record is simply void of any evidence that the Corporation, Brewer or McCoy acted with improper motives or with hatred, ill will or a spirit of

revenge. Because the chancellor's findings were clearly erroneous, and because he gave no reason for rejecting the master's findings as clearly erroneous, we find the Corporation did not exercise its discretion in bad faith. Therefore, the award to the ratepayers and the award of lost profits against the Conway Corporation are reversed.

This does not resolve the issue of Brewer's and McCoy's liability because bad faith need not be proven to recover for tortious interference with a business expectancy. *Walt Bennett Ford, Inc. v. Pulaski County Spl. School Dist.*, 274 Ark. 208, 624 S.W.2d 426 (1981), *supp. opinion on denial of rehearing*. However, the defendant may show his interference was privileged. Privilege means a defendant will not be liable if he acts, without bad faith, to protect the public interest or a third person to whom he stands in a relation of responsibility. The evidence, as stated above, shows Brewer and McCoy should have the benefit of the privilege. They acted without bad faith in the interest of those to whom they were responsible and should not be held liable for interference with a business expectancy.³ Therefore, the award of damages against them is reversed.

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We do not reach the issue of whether the appellants are immune from liability as municipal agents or employees. See Ark. Code Ann. §21-9-301 (1987); *Matthews v. Martin*, 280 Ark. 345, 658 S.W.2d 374 (1983).⁴ Nor do we reach the question of whether the claim against appellant McCoy should have been transferred to circuit court. See *McCoy v. Munson*, 294 Ark. 488, 744 S.W.2d 708 (1988). Having reversed the award of damages, we do not address CEI's issues on cross-appeal.

One issue does merit discussion. This case was tried prior to our decision in *Klinger v. City of Fayetteville*, 297 Ark. 385, 762 S.W.2d 388 (1988). In *Klinger* an unsuccessful bidder sued the city for lost profits. We said the following:

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The appellants claim this language requires reversal of the award of damages against them.

The appellee counters this argument by citing *Walt Bennett Ford, Inc. v. Pulaski Spl. School Dist.*, *supra*. There, a disappointed bidder sued to set aside a contract between the school district and the successful bidder and also sued various individuals for the tort of interference with a contract. We held that "an unsuccessful bidder does have standing to sue for alleged wrongs" in the bidding process.

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relief or mandamus for example, but he may not recover lost profit damages from the authority. Even so, according to *Walt Bennett Ford*, he is not prevented from pursuing a tort action and damages against individual defendants, such as Brewer and McCoy in this case. But that statement is without regard to the question of immunity, which was not an issue in *Walt Bennett Ford*.

Reversed and dismissed

PURILE, J., not participating.

**IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION**

**CONSTRUCTION ENGINEERS, INC.
PLAINTIFF**

VS. NO. 86-3687

**THE CONWAY CORPORATION, et al.
DEFENDANTS**

**ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, ARKANSAS CHAPTER
INTERVENOR**

**MICHAEL SUTTERFIELD and
CATHERINE N. RUSHING
INTERVENORS**

**CHANCELLOR'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

On March 24, 1987, the Plaintiff's Petition for a temporary restraining order and preliminary injunction came on for hearing before a Special Master appointed by this Court. At the conclusion of that hearing, the Master reported his Findings of Fact and Conclusions of Law, which Findings and Conclusions were subsequently objected to by the Plaintiff,

Construction Engineers, Inc. and the Intervenor, Associated General Contractors of America, Arkansas Chapter, by motions and notices duly filed and served. At a later hearing on those objections, this Court held that pursuant to Rule 53(e)(2) it would receive further evidence on the plaintiff's claims and would consolidate and advance those claims with the Plaintiff's claim for permanent injunctive relief. Such action was taken and a trial on the Plaintiff's claim for a permanent injunction was held on June 25-26 and June 29, 1987. After hearing the testimony and other evidence presented at that trial, after having reviewed the transcript and exhibits from the prior hearing before the Master, and being well and sufficiently advised as to all matters of law and fact, the Court makes the following Findings of Fact and Conclusions of Law:

1. The Plaintiff, Construction Engineers, Inc., (hereinafter CEI) is an Arkansas corporation duly existing and authorized to do business under the laws of the State of Arkansas, with its principal place of business located in Russellville, Pope County, Arkansas. CEI holds a contractors license which was duly authorized by the Arkansas Contractors' Licensing Board.

2. The Defendant, The Conway Corporation, is a private, non-profit corporation which operates the water system of the City of Conway, Arkansas, by virtue of and in accordance with a contract with said City.

3. The Defendant, M. D. Limbaugh Construction Co., is a Missouri corporation authorized to do business in Arkansas, and having its registered agent located in Pulaski County, Arkansas.

4. The Defendant, Jim Brewer, is an individual resident of Conway, Faulkner County, Arkansas, and was and is the General Manager of The Conway Corporation.

5. The Defendant, Bennie J. McCoy, is an individual resident of Pulaski County, Arkansas, and is an engineer for and President of Crist Engineers of Pulaski County, Arkansas. At all times pertinent to this litigation, Defendant McCoy was employed under contract by The Conway Corporation.

6. The Defendants, Larry Graddy, Frank Robins, III, Lou Gordy, Bill Pate, Bob Clifton, and Leo Crofton, III, individual residents of Conway, Faulkner County, Arkansas, are members of the Board of Directors of The Conway Corporation.

7. The Intervenor, Associated General Contractors of America, Arkansas Chapter (hereinafter AGC), is a non-profit professional association which represents the interests of contractors throughout the State of Arkansas, and which has its principal office located in Little Rock, Pulaski County, Arkansas.

8. The Intervenors, Michael Sutterfield and Catherine N. Rushing, are individual residents, ratepayers and taxpayers of the City of Conway, Faulkner County, Arkansas.

9. In May and June, 1986, Defendant, The Conway Corporation, solicited bids from contractors through the public bidding procedures for the construction of certain water treatment improvements to the water system of the City of Conway, Arkansas. The bids were to be submitted to Defendant The Conway Corporation until 1:30 P. M., June 26, 1986, at which time the bids were opened and announced publicly. The bidding was to be conducted pursuant to the laws of the State of Arkansas regulating construction of public improvements, as well as pursuant to the bid specifications themselves contained in the documents.

10. The Plaintiff, CEI, among others, submitted its bid to The Conway Corporation for a contract to construct improvements shown on Schedule 1 of the bid documents. CEI's bid on said project, which was accompanied by all required bonds, was \$3,885,900.00, and Defendant M. D. Limbaugh Construction Co.'s bid was \$3,952,000.00.

11. CEI was the low bidder on the public works project in question, and M. D. Limbaugh was the second low bidder on the project.

12. Upon the recommendation of Defendants Jim Brewer and Bennie McCoy, The Conway Corporation, through its Board of Directors, voted on July 7, 1986, not to award the contract to CEI, the low bidder, but to instead award the contract to Defendant M. D. Limbaugh Construction Co., the second low bidder.

13. On August 20, 1986, CEI filed suit requesting a preliminary and permanent injunction enjoining Defendants, The Conway Corporation, its named board members and Jim Brewer from awarding the contract to Defendant M. D. Limbaugh, or if the contract had already been awarded, from failing to set aside said contract. CEI further requested that M. D. Limbaugh be enjoined from performing work under the contract, and that CEI be awarded the contract. Alternatively, CEI prayed for damages against each of the named Defendants (except Limbaugh) individually, and in their capacities as agents for The Conway Corporation.

14. In its Complaint, CEI alleged, among other things, that the named Defendants acted in bad faith and without good cause in awarding the contract to Defendant Limbaugh and that their actions were arbitrary and capricious and in violation of the Arkansas bidding statutes.

15. Subsequent to the filing of the Complaint,

the AGC, as well as Michael Sutterfield and Catherine N. Rushing, requested that they be allowed to intervene in this action and after motions and orders allowing the intervention were duly filed and served, the Intervenor filed Complaints in Intervention which were also duly filed and served on the Defendants herein.

16. The Complaint in Intervention filed by AGC contends that M. D. Limbaugh was awarded the contract in question in violation of the Arkansas Public Bidding Statutes and that the named Defendants should be enjoined from proceeding with the contract.

17. The Complaint in Intervention filed by Michael Sutterfield and Catherine N. Rushing seeks relief in the form of injunctive relief as well as damages due to the Defendants actions which constitute an illegal exaction in violation of the Constitution and statutory laws of the State of Arkansas.

18. The Court finds that the AGC, Michael Sutterfield and Catherine N. Rushing, were rightfully allowed to intervene in this action and that their interests in this cause of action are substantial.

19. The Court further finds that the Plaintiff, CEI has proven that it was not only the low monetary bidder on the project in question, but that it was a responsible bidder, qualified and capable of performing the work for which it bid. Accordingly, CEI was the

“lowest responsible bidder” on the project as that term is set forth in the Arkansas bidding statutes found in Title 14 of the Arkansas Statutes Annotated. All credible evidence in this case so convinces the Court on this issue.

20. Plaintiffs and Intervenors contend that this case is controlled by *Ark. Stat. Ann.* §§14-113 through 14-116 (as amended by Act 862 of 1983), or in the alternative, by construing §§14-113 through 14-116 and §14-612 together so that the definition of responsible bidder contained in §14-114 applies to §14-612 and thus the law requires a public works contract to be given to that bidder who has posted all statutorily required bonds and is the lowest bidder in monetary terms. On the other hand, the Defendants contend that §14-612 alone is the controlling statute and allows discretion in the awarding of a public works contract. Under the Defendants’ interpretation, “good faith” and “good cause” must be found to exist in order to deny the lowest monetary bidder the contract. While both parties’ arguments seem well-taken, the Court finds that no matter which statute or statutes apply, the Defendants in this case should not have denied CEI the contract in question and that the decision to do so was arbitrary, capricious and without cause. The Court further finds that Defendants Jim Brewer and Bennie J. McCoy acted in bad faith in urging the denial of CEI’s bid.

21. The Court specifically finds that Defendant Jim Brewer and Defendant Bennie J. McCoy

wrongfully and in bad faith made their decision to urge rejection of CEI's bid prior to the bids ever being accepted or opened and said Defendants deliberately set out to deny CEI the opportunity to bid on the project. The Court notes that the evidence shows that said Defendants wrongfully and without valid cause tried to dissuade CEI from even bidding on the project and this action was taken in light of a prior good working relationship between CEI and The Conway Corporation and Defendant Bennie J. McCoy.

22. Subsequent to Defendants Brewer and McCoy's decision to urge rejection of the CEI bid, and after it was discovered that CEI was in fact the low bidder on the project in question, Defendants Brewer and McCoy attempted to justify their decision to urge rejection of CEI's bid by conducting a most cursory and biased investigation which included such actions as soliciting negative letters and negative information regarding CEI, and passing on unsubstantiated rumors. Additionally, some of the notes and testimony of Bennie J. McCoy were proven to be untrue, and the investigation appears to have been a mere cover-up of his earlier decision to recommend that CEI's bid be rejected in favor of M. D. Limbaugh's bid. Specifically, McCoy's notes of his alleged investigation reflect that information from events which occurred after the investigation were used in an attempt to substantiate the results.

23. While the court finds that Defendants Brewer and McCoy acted in bad faith, it finds that the Board, while relying on erroneous information in voting to reject CEI's bid, did not act in bad faith. However, the Board's decision was without cause. Further, the Court has some concern with some of the board members' testimony which was inconsistent with the testimony of the Defendants own witness, Carl Stuart, who, contrary to the testimony of the board members, testified that he had only talked to Defendant Brewer regarding certain problems in connection with a Conway school constructed by CEI. And, as Stuart testified, this information was relayed to Defendant Brewer only after Mr. Brewer solicited same.

24. The Court further finds that under *Ark. Stat. Ann.* §§14-113 through 14-116 separately, or construed together with §14-612, or under §14-612 alone, this Court would and should enjoin the failure to award a contract to the lowest responsible bidder and would also enjoin construction by the second low bidder, as the Court cannot countenance bad faith or a failure to follow Arkansas law. However, this Court is also persuaded and finds that due to no fault on the part of the parties hereto or their attorneys, and specifically because the project in question is now some 43% complete, the disruption to the project, as well as the confusion and hardship which would result from the enjoining of the project would cause too great a harm to the citizens and ratepayers of the City of Conway. For

this reason, and this reason alone, the Court finds that an injunction should not issue against the Defendants in this case even though an injunction would normally be an appropriate remedy in this type of case. However, the Court does find that damages should be awarded to both CEI and Intervenor Michael Sutterfield and Catherine N. Rushing, as ratepayers and taxpayers, and accordingly will set a hearing on the issue of the Plaintiff and Intervenor's damage claims at a time to be set by this Court.

25. The Court also finds that the Masters Findings and Conclusions should be rejected and therefore the Defendants' Motion to adopt same should be denied.

26. Finally, the Court finds that Defendant Bennie J. McCoy's Separate Motion to Transfer to Circuit Court should be denied. Defendant McCoy contends that this Court is without jurisdiction because the claims against him are only for monetary damages. For two reasons this argument is without merit. First, where a chancery court has some nexus to the claim in question, whether the claim should be heard by that court is a matter of propriety rather than subject matter jurisdiction. Using this propriety, or discretion, and specifically confirming that all parties are properly before this Court, it is necessary to keep all parties and causes of action before this Court because all matters considered in this case arise out of the same transactions

and occurrences. By retaining all facets of this case, multiplicity of actions and repetitive presentation of the same evidence will be avoided. Second, where damages sought are incidental to a clearly equitable remedy, such as in this case, a chancery court can determine the damages issue under the "clean up" doctrine. Moreover, the Court specifically rejects Defendant McCoy's authority that a chancery court may not take jurisdiction of a tort claim arising out of the same transaction or occurrence as an equitable claim. *Gorchik v. Gorchik* was expressly overruled on that point by *Liles v. Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986). Since the damages sought against Defendant McCoy and the other named Defendants are incidental to the Plaintiff's request for injunctive and declaratory relief, this Court has jurisdiction over the Plaintiff's and Intervenor's damage claims against the Defendants hereto.

LEE A. MUNSON

Chancellor

July 6, 1987.

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

CONSTRUCTION ENGINEERS, INC.
PLAINTIFF

VS. NO. 86-3687

THE CONWAY CORPORATION, et al.
DEFENDANTS

ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, ARKANSAS CHAPTER
INTERVENOR

MICHAEL SUTTERFIELD and
CATHERINE N. RUSHING
INTERVENORS

JUDGMENT

The trial of this case was bifurcated on the Court's motion. The issue of liability was tried to the Court on June 25, June 26, and June 29, 1987. The evidence from earlier proceedings before a Master, which began on March 24, 1987, was consolidated with these hearings. On the 6th day of July, 1987, this Court issued its findings of fact and conclusions of law. The issue of damages was tried beginning the 8th day of

APPENDIX A-42

March, 1988. The case is now fully tried. The Court readopts its findings of fact and conclusions of law of July 6, 1987. The Court finds on the issue of damages as follows hereinbelow:

1.

Construction Engineers, Inc. (hereinafter referred to as "CEI") was the low bidder on the Gleason Project by an amount of \$66,000.00. That amount shall be repaid to the taxpayers/ratepayers, as a class, through a refund to be included on each taxpayers'/ratepayers' monthly water bill. This refund shall be payable to those taxpayers/ratepayers who were users as of the date of the entry into this contract. This Court finds that date to be July 29, 1986. I further find that the attorney for the taxpayers/ratepayers, is entitled to attorney's fees in the amount of \$6,600.00.

2.

The Court finds that the measure of damages to be awarded to the Plaintiff, CEI, is five percent (5%) of the total contract price. The Plaintiff's contract price was \$3,885,900.00. I find that five percent (5%) of that amount is \$194,295.00, which I find to be the correct measure of lost profits based on the totality of the testimony offered at the hearing on March 8 and March 9, 1988. I find that this award of damages is joint and several against the Conway Corporation, Jim Brewer and Bennie J. McCoy. While this Court had indicated in its May 3, 1988 letter that Defendant McCoy's agency status

APPENDIX A-43

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS

Construction Engineers, Inc.,
Plaintiff
vs. No. 86-3687

The Conway Corporation, et al.
Defendants
Associated General Contractors
of America, Arkansas Chapter
Intervenor
Michael Sutterfield and
Catherine N. Rushing
Intervenors

AFFIDAVIT OF JAMES H. BREWER

KNOW ALL MEN BY THESE PRESENTS:

That I, James H. Brewer, having been first duly sworn, state on oath as follows:

1. In order to properly summarize and evaluate the events that culminated in the decision of the Conway Corporation Board not to award the Gleason water plant project to Construction Engineers, Inc. in July of 1986, one must go back in time to the 1980-83 time frame when the Conway Public School District

APPENDIX A-56

encountered Construction Engineers, Inc. ("CEI") as low bidder on the Florence Mattison Elementary School Project in Conway. A contract was awarded to CEI by the School District in August of 1980. The project was to be completed in June of 1981. Completion of this project in a timely manner was of the utmost importance because 300 students would have no school to attend in August of 1981 without this facility.

2. The Florence Mattison Project was incomplete and unacceptable in August of 1981. However, the contractor required a Certificate of Substantial Completion from the school district before it would allow children to occupy the facility. After CEI promised to properly address problems with regard to the water piping not being properly installed and insulated, the ceiling tiles not being properly installed, the building insulation not properly installed, the cabinets not being to specification, the windows being improperly hung and constructed of the wrong materials (i.e., plate glass windows were installed rather than safety glass in violation of state law concerning schools) and other problems, the school board signed the Certificate.

3. Notwithstanding the Certificate of Substantial Completion, the students had to move out of the building within a few months of occupancy because the improperly installed and uninsulated water piping ruptured from freezing. Since the piping was located in

APPENDIX A-57

may have protected him from a finding of damages, this Court is now persuaded the law of agency is otherwise. Accordingly, McCoy is found to be jointly and severally liable with Defendant, the Conway Corporation and Jim Brewer. The Court considered apportioning damages among the Defendants; however, without a request by Defendants for apportionment, the Court declines to do so.

At the trial on March 8 and March 9, 1988, Defendant McCoy proffered certain documents on the issue of liability. While this evidence on the issue of McCoy's liability was not timely presented, the Court has looked at McCoy's evidence in the interest of fairness to all parties. The proffer consists largely of a transcript of Defendant McCoy's testimony in the case and one version of a letter of July 3, 1986, which is Plaintiff's Exhibit 10, in the case. Both McCoy's testimony and the letter, Plaintiff's Exhibit 10, are already before the Court and were considered by the Court in arriving at its decision on the issue of liability. The only other evidence proffered by Defendant McCoy was the affidavits of an engineer and an attorney. While the Court has doubts as to the relevancy and competency of this proffered testimony, it should be noted that the proffered testimony does nothing to persuade the Court that its findings of July 6 on liability are incorrect. Consequently, even if the proffered testimony had been timely presented, the Court's findings would have been the same.

3.

The Court is unable to find that prejudgment interest is awardable in this action. Specifically, the Court finds that such an award would be speculative and was not determinable at the time the contract was entered into. Accordingly, prejudgment interest is denied.

4.

The Court does not find that an award of attorney's fees is proper or authorized by the law in this case. The Court has reviewed the law cited by Plaintiff in its briefs, but is not convinced that the *Liles* case is controlling under this set of facts. Accordingly, the prayer of attorney's fees of Plaintiff is denied.

5.

The Court finds that it is without the power to award punitive damages. For that reason, this Court did not allow Plaintiff to introduce proof on this issue or to argue evidence in the record which might touch on the issue of punitive damages at the trial on March 8 and March 9, 1988. Accordingly, Plaintiff's prayer for punitive damages is denied.

This Court reserves jurisdiction of this cause

to enforce its judgment and decree.

IT IS SO ORDER, ADJUDGED and
DECREED.

LEE A. MUNSON

Chancellor

July 22, 1988

FRIDAY, ELDREDGE & CLARK

Attorneys at Law

2000 First Commercial Building

Little Rock, Arkansas 72201

March 23, 1988

Chancery Clerk

Pulaski County Courthouse

Little Rock, Arkansas 72201

Re: CEI v. The Conway Corporation, et al.
(Pulaski Chancery No. 86-3687)

Gentlemen:

Enclosed please find the original and copies of a Proffer which I would appreciate your filing in the captioned case. Please stamp the extra copies with your filing stamp and return them to me in the enclosed envelope.

By copy of this letter I am serving a copy of the enclosed pleading upon all attorneys of record.

Thank you.

Sincerely yours,
MICHAEL G. THOMPSON

cc: Mr. David Orsini
Mr. James Moody
Mr. Jim Rhodes
Ms. Janice W. Vaughn

**IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION**

**CONSTRUCTION ENGINEERS, INC.
PLAINTIFF**

VS. NO. 86-3687

**THE CONWAY CORPORATION, et al.
DEFENDANTS**

**ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, ARKANSAS CHAPTER
INTERVENOR**

**MICHAEL SUTTERFIELD and
CATHERINE N. RUSHING
INTERVENORS**

PROFFER

**The defendants, (except Bennie McCoy) for
their proffer herein, state:**

**1. This Court has previously decided the
liability issues involved in this case and, by Order entered
herein on February 25, 1988, has ruled that the
defendants shall not be entitled to introduce any**

evidence on the issue of liability, the question of bad faith or the character and reputation for truth and veracity of any of the parties.

2. These defendants intended to present evidence at the final hearing herein on March 8 and 9, 1988, touching on the matters mentioned above and were prepared to call witnesses who would testify with regard thereto. In view of the fact that the Court has denied the defendants the right to place such evidence into the record, the Court has, upon motion of the defendants, allowed them to proceed by way of proffer in the form of affidavits and otherwise.

3. The affidavits of Elaine Goode, James H. Brewer, Stanley Russ, Don Owen, Maurice Moix, Woodrow Cummins, William L. Wright, Jerry L. Maulden and David Harrington are attached hereto and made a part hereof and are hereby proffered by these defendants as evidence in their defense. If the affiants were present in Court and if the Court had allowed their testimony, they would have testified to the matters set forth in their respective affidavits.

4. The defendants further hereby proffer additional testimony from Carl Stuart (incorrectly identified in the record as "Stewart"), a previous witness. In the hearing held herein on June 29, 1987, Mr. Stuart stated, when asked if he had communicated his experience with the plaintiff on the Florence Mattison

School Project to the members of the Board of Directors of the Conway Corporation, that he did not know any of the board members except Frank Pobins. He subsequently testified that while he personally knew the members of the board he did not know that they were board members. Mr. Stuart misunderstood the question asked of him and, if allowed to further testify, he would state that he did have conversations from time to time with the board members, not at a formal board meeting, during which he told them of his construction problems with the plaintiff.

5. In addition to the foregoing, these defendants hereby proffer all of the previous testimony taken in the case and ask the Court to consider such testimony along with the evidence contained herein in making a final decision on the liability issues involved in this case.

DATED this 23rd day of March, 1988.

FRIDAY, ELDREDGE & CLARK
2000 First Commercial Building
Little Rock, Arkansas 72201
(501) 376-2011)
Attorneys for Defendants
(Except Bennie McCoy)
By: MICHAEL G. THOMPSON

CERTIFICATE OF SERVICE

I, Michael G. Thompson, certify that a copy of the foregoing Proffer has been mailed to the following attorneys of record: Mr. David Orsini, Orsini & Associates, Centre Place, Suite 200, 212 Center Street, Little Rock, Arkansas 72201, Mr. James Moody, Wright, Lindsey & Jennings, 2200 Worthen Bank Building, Little Rock, Arkansas 722001, Mr. James Rhodes, 3800 Capitol Tower, Little Rock, Arkansas 72201, and Ms. Janice W. Vaughn, 3800 Capitol Tower, Little Rock, Arkansas 72201, on this 23rd day of March, 1988.

MICHAEL G. THOMPSON

**IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS**

Construction Engineers, Inc.

Plaintiff

vs. No. 86-3687

The Conway Corporation, M. D. Limbaugh
Construction Co., Jim Brewer, Bennie J
McCoy, John Doe I, John Doe II, and
Defendants Larry Graddy, Frank Robins, III,
Luke Gordy, Bill Pate, Bob Clifton, and
Leo Crafton, III, as Members of the Board of
Directors of The Conway Corporation

Defendants

AFFIDAVIT

KNOW ALL MEN BY THESE PRESENTS:

That I, Elaine Goode, a resident of Conway,
Arkansas, after having been first duly sworn, state on
oath as follows:

1. I am a member of the Board of the
Conway School District of Conway, Arkansas, and have
been for a number of years. I was a member of the
School Board when the Florence Mattison School
Project was constructed in our city by Construction

Engineers, Inc.

2. As a member of the School Board, I became aware of numerous problems which we had with the performance of the construction contract by Construction Engineers, Inc. (CEI). In the first place, the construction plans called for the sewer lines serving the Project to be buried at a specified depth in order to allow the sewage to drain by gravity. CEI placed the lines too deep and, because of their mistake, wanted to use a lift pump to raise the sewage. This was objectionable and the Superintendent instructed CEI to properly relay the sewer line.

3. During the period in which the Florence Mattison School was under construction, the weather was good but the work was not accomplished on schedule. CEI continually lagged behind in getting the work finalized. The plans called for all water lines to be laid in the concrete floors. The contractor failed to place the water lines before pouring the concrete. Rather than tearing up the floors and repouring the concrete over the lines as required by the plans, CEI obtained permission from the architect to place the water lines above the ceiling of the building. The architect required the lines to be insulated but CEI failed to properly wrap the lines. As a consequence the water pipes froze, causing serious damage to the school building and its contents.

4. In addition to the foregoing, CEI failed to

place safety glass in all of the windows of the Project which was contrary to state laws which require such glass. All of the glass had to be replaced with the proper type of safety glass. None of the drawers in the Project were constructed according to plans and specifications. This caused numerous delays and problems.

5. I was quite concerned about CEI's competency in view of the fact that the building plans used by it were identical to the plans used on another school project with which I am familiar, the Julia Lee Moore School, which was built by Nabholz Construction Company. As compared with CEI's performance on the Florence Mattison School Project, we had absolutely no problem with Nabholz's performance on the Julia Lee Moore School, utilizing the same drawings and plans.

6. The School Board had to stand over CEI day after day to force it to get the job done. Without reservation, I would say that CEI's work product on the Florence Mattison School Project was the most shoddy, poorly constructed and poorly managed job I have ever seen. Since the job was completed, our regular maintenance people have been kept busy in correcting defects and attending to problems which should never have arisen if the contractor had done its job. I would never use CEI on another construction project.

7. I have known James H. Brewer, General Manager of The Conway Corporation, for many years. I,

of my own personal knowledge, know Mr. Brewer's reputation for truth and veracity to be unimpeachable. His character is above reproach and in his dealings with others, he has always acted fairly and honestly. I have never known Mr. Brewer to commit any act in bad faith or to otherwise unfairly deal with anyone in any of his business dealings or otherwise. Because of my knowledge of Mr. Brewer's high character I would unquestionably take his word at face value.

DATED this 9 day of March, 1988.

ELAINE GOODE

SUBSCRIBED AND SWORN to before me,
a Notary Public, on this 9 day of March, 1988.

WILLIAM M. HEGEMAN

My Commission Expires 2-1-1993

the ceiling (close to the roof) rather than in the floor as specified, the building was substantially damaged by flooding and classes were interrupted. Work continued on this project until January of 1983, significantly beyond the contract completion date of June 1981. The Florence Mattison School still requires excessive maintenance because of the original faulty construction.

4. The inability of CEI to properly perform under its contract and its lack of the managerial skill needed to coordinate the subcontracts of a project of this magnitude were widely known in the community and discussed quite frequently by members of the school board and the general citizenry of Conway. The litigation that followed seemed to be CEI's solution to their inability to get the school properly constructed within the allowed time frames, but spoke very little to the needs of the community for the housing of school children. This litigation was still pending as late as 1986.

5. In June of 1984, the Conway Corporation offered for bid a modification to the Gleason water plant (referred to by some as the "little Gleason" job) which included the installation of pumping and some concrete work. CEI submitted the low bid of \$34,500.00 and was awarded the contract for this work. Even though we could recall very vividly the horrendous problems with CEI and its poor performance in the construction of the Florence Mattison school, it was more in the posture of a subcontractor on this project, since the Conway

Corporation was functioning as its own general contractor. The Conway Corporation had more employees at the construction site than did CEI. While CEI had only two or three employees on site, the Conway Corporation provided all supervision for and coordination of the entire project. With this arrangement, we were in total control of completion time of the project, which was critical. In this scenario and under these conditions, CEI performed adequately.

6. In 1985 and early 1986, the Conway Corporation planned a significant expansion of the Gleason water treatment plant, i.e., from a capacity of 7.5 million gallons per day to 15 million gallons per day. CEI requested and received a set of plans and specifications for the purpose of bidding this project.

7. In April and May of 1986, CEI was in the latter stages of a sewer construction project at Morrilton, Arkansas, and we were receiving reports that this project was experiencing difficulties with CEI of the same nature that were experienced in the Florence Mattison School project. In view of this information, a couple of Conway aldermen who had knowledge of that project, suggested to me that I should further check into the matter.

8. While I am an employee of the Conway Corporation, which operates the utilities owned by the City of Conway, I communicate very closely with the Conway City Council and stay attuned to its desires since

it does, in fact, represent the owner of the utilities operated by the Conway Corporation and since it is, in fact, the governing body in many substantial matters concerning the utility system. The City Council, as well as the Board of Directors and the management of the Conway Corporation were very sensitive to the water needs of the citizens of Conway, because we had experienced a shortfall in finished water available to the consumer in the summer of 1985. It was anticipated that, if the expansion of the plant was not completed by the summer of 1988, there would be a significant water shortage in Conway, which would substantially affect all of its citizens, including the University of Central Arkansas, the Human Services Development Center, Hendrix College and some 60 industries providing employment to over 6,000 people. Therefore, I felt that an investigation of this matter was of the utmost importance to our community.

9. Since I had planned to leave for an extended trip late in May and would not return until late June and since my work load during the month of May would not allow me time to make an investigation, I asked Mr. Bennie McCoy, President of Crist Engineers, and Roger Mills, Manager of Engineering & Planning for the Conway Corporation, to look into this matter. Discussions with McCoy and Mills led me to feel an obligation to contact Steve and Danielle Smith of CEI to alert them to our apprehensions concerning their ability to construct this project in a timely manner, considering

our knowledge of the Mattison School project and the Morrilton Sewer Plant project, since bidding on the Gleason water plant would require a great deal of their time and effort and would be rather expensive for them. Before leaving my office in late May, I asked Mr. McCoy to contact the Smiths and express to them our apprehensions. Mr. McCoy contacted the Smiths by telephone on two occasions and exchanged letters with them in late May and June.

10. The Conway Corporation accepted bids on the Gleason Water Plant project on June 26, 1986. CEI was the low bidder. In view of our apprehensions concerning CEI and because we had virtually no knowledge concerning the second low bidder, the M. D. Limbaugh Company of Sikeston, Missouri, I asked Mr. McCoy to prepare a study of the qualifications of both the low and second low bidders. After his study was complete, Mr. McCoy prepared a report which was presented to the Conway Corporation Board of Directors on July 7, 1986. I also prepared a report for the Board of Directors, which was presented to them at that same meeting, and which dealt, for the most part, with the financing of the project.

11. As manager of the Conway Corporation, I fulfilled my obligation to my Board by rendering a prepared recommendation that included awarding the Gleason Water Plant project bid to the M. D. Limbaugh Construction Company as the second low bidder and

first low responsible bidder, as required by state law. My recommendation was based upon the report of Mr. McCoy, the discussions and information acquired from Roger Mills, Manager of Engineering & Planning of the Conway Corporation, Dale Norman, Superintendent of Water & Sewer Systems & Plants of the Conway Corporation, Ray Martin, Superintendent of the Gleason Water Treatment Plant, Frank Robins, Chairman of the Conway Corporation Board of Directors, the Mayor, City Attorney and several Aldermen of the City of Conway, Mr. John Gill, Legal Counsel, Carl Stuart, Superintendent of the Conway Schools, several School Board members, including the Board's Chairman and Secretary and other interested Conway citizens.

12. After hearing the recommendations of Mr. Bennie McCoy and myself, the Board of Directors of the Conway Corporation unanimously voted to award the contract for the Gleason Project to the M. D. Limbaugh Company.

13. I can unequivocally state that, at no time did I bear any malice or ill will toward CEI or the Smiths. My concern was for the welfare of the citizens of the City of Conway and all of my actions were undertaken with that welfare in mind. I never acted in "bad faith" in requesting the McCoy investigation or in making my recommendation to the Board. I felt that, as a result of the investigation and of my knowledge of Florence Mattison School job, the award of our contract

to CEI would have had catastrophic consequences for our community. At all times relevant to this case I was merely doing my job as I saw it. My decision to recommend that CEI's bid be rejected was not made until after all of the information mentioned above was obtained and evaluated.

DATED this 22 day of March, 1988.

JAMES H. BREWER

SUBSCRIBED AND SWORN to before me,
a Notary Public, on this 22 day of March, 1988.

WILLIAM M. HEGEMAN

My Commission Expires 2-1-1993

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS

Construction Engineers, Inc.

Plaintiff

vs. No. 86-3687

The Conway Corporation, M. D. Limbaugh
Construction Co., Jim Brewer, Bennie J.
McCoy, John Doe I, John Doe II, and
Defendants Larry Graddy, Frank Robins, III,
Luke Gordy, Bill Pate, Bob Clifton, and
Leo Crafton III, as Members of the Board of
Directors of The Conway Corporation,
Defendants

AFFIDAVIT

KNOW ALL MEN BY THESE PRESENTS:

That I, Stanley Russ, a resident of Conway,
Arkansas, having been first duly sworn, state on
oath as follows:

1. I have known James H. Brewer, General
Manager of The Conway Corporation and a resident of
Conway, Arkansas, for over 35 years. I, of my own
personal knowledge, know Mr. Brewer's reputation for
truth and veracity to be unimpeachable. His character is

above reproach and in his dealings with others, he has always acted fairly and honestly.

2. I have never known Mr. Brewer to commit any act in bad faith or to otherwise unfairly deal with anyone in any of his business dealings, or otherwise.

3. Because of my knowledge of Mr. Brewer's high character I would unquestionable take his word at face value.

DATED this 9 day of March, 1988.

STANLEY RUSS

SUBSCRIBED AND SWORN to before me,
a Notary Public, on this 9 day of March, 1988.

WILLIAM M. HEGEMAN

My Commission Expires 2-1-1993

**IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS**

Construction Engineers, Inc.

Plaintiff

vs. No. 86-3687

The Conway Corporation, M. D. Limbaugh
Construction Co., Jim Brewer, Bennie J.
McCoy, John Doe I, John Doe II, and
Defendants Larry Graddy, Frank Robins, III,
Luke Gordy, Bill Pate, Bob Clifton, and
Leo Crafton III, as Members of the Board of
Directors of The Conway Corporation,
Defendants

AFFIDAVIT

KNOW ALL MEN BY THESE PRESENTS:

That I, Don Owen, a resident of Conway,
Arkansas, having first been duly sworn, state on oath as
follows:

1. I am a member of the City Council of the
City of Conway, Arkansas, and have been for the past 7
years. In my capacity as a member of the City Council, I
had discussions with James H. Brewer of The Conway
Corporation in late June and early July of 1986, during

which time The Conway Corporation was in the process of selecting a contractor to perform construction work in connection with the expansion of the Gleason Plant in Conway.

2. In our conversations, Mr. Brewer sought my advice, as a member of the City Council, with respect to whether The Conway Corporation should consider rejecting Construction Engineers, Inc.'s bid for cause. In view of my knowledge of CEI's reputation in the community regarding its ability to properly construct, conclude and manage a construction project, primarily my first hand knowledge of its mismanagement of the Florence Mattison School Project in Conway, I advised Mr. Brewer that in my opinion, as a member of the City Council of Conway, Arkansas, it would be a mistake to award the contract for the construction of the Gleason Project to Construction Engineers, Inc.

3. I know that, at the time of my conversations with Mr. Brewer, he had not prejudged the issue. He was acting in good faith at all times and had not decided what his recommendation to the Board of Directors of The Conway Corporation would be with respect to the matter. Mr. Brewer discussed the bid award issue with me and other members of the City Council for the purpose of acquiring our guidance and advice in deciding upon the best course of conduct to follow in connection with selecting a contractor.

DATED this 9 day of March, 1988.

DON OWEN

SUBSCRIBED AND SWORN to before me,
a Notary Public, on this 9 day of March, 1988.

WILLIAM M. HEGEMAN

My Commission Expires 2-1-1993

**IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS**

Construction Engineers, Inc.

Plaintiff

vs.

No. 86-3687

The Conway Corporation, M. D. Limbaugh
Construction Co., Jim Brewer, Bennie J.
McCoy, John Doe I, John Doe II, and
Defendants Larry Graddy, Frank Robins, III,
Luke Gordy, Bill Pate, Bob Clifton, and
Leo Crafton III, as Members of the Board of
Directors of The Conway Corporation,

Defendants

AFFIDAVIT

KNOW ALL MEN BY THESE PRESENTS:

That I, Maurice Moix, a resident of Conway, Arkansas, having first been duly sworn, state on oath as follows:

1. I am a member of the City Council of the City of Conway, Arkansas, and have been for the past 7 years. In my capacity as a member of the City Council, I had discussions with James H. Brewer of the Conway Corporation in late June and early July of 1986, during which time the Conway Corporation was in the process of selecting a contractor to perform construction work in connection with the expansion of the Gleason Plant in Conway.

2. In our conversations, Mr. Brewer sought my advice as a member of the City Council, with respect to whether the Conway Corporation should consider rejecting Construction Engineers, Inc.'s bid for cause. In view of CEI's reputation in the community regarding its ability to properly construct, conclude and manage a construction project, primarily the Florence Mattison School Project in Conway and the question of problems they might be having on the Morrilton Sewer Project, I advised Mr. Brewer that, in my opinion, as a member of the City Council of Conway, Arkansas, he should seek out information regarding those two projects to see if CEI were capable of completing the contract for the construction of the Gleason Project.

3. I know that, at the time of conversations

with Mr. Brewer, he had not prejudged the issue. He was acting in good faith at all times and had not decided what his recommendation to the Board of Directors of the Conway Corporation would be with respect to the matter. Mr. Brewer discussed the bid award issue with me for the purpose of acquiring my guidance and advice in deciding upon the best course of conduct to follow in connection with selecting a contractor.

DATED this 9 day of March, 1988.

MAURICE MOIX

SUBSCRIBED AND SWORN to before me,
a Notary Public, on this 9th day of March, 1988.

LOIS M. LEE

My Commission Expires 8-11-95

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS

Construction Engineers, Inc.

Plaintiff

vs.

No. 86-3687

The Conway Corporation, M. D. Limbaugh
Construction Co., Jim Brewer, Bennie J.
McCoy, John Doe I, John Doe II, and
Defendants Larry Graddy, Frank Robins, III,
Luke Gordy, Bill Pate, Bob Clifton, and
Leo Crafton III, as Members of the Board of
Directors of The Conway Corporation,

Defendants

AFFIDAVIT

KNOW ALL MEN BY THESE PRESENTS:

That I, Woodrow Cummins, a resident of
Conway, Arkansas, having first been duly sworn, state on
oath as follows:

1. I am a member of the City Council of the
City of Conway, Arkansas, and have been for the past 5
years. In my capacity as a member of the City Council, I
had discussions with James H. Brewer of The Conway
Corporation in late June and early July of 1986, during
which time the Conway Corporation was in the process

of selecting a contractor to perform construction work in connection with the expansion of the Gleason Plant in Conway.

2. In our conversations, Mr. Brewer sought my advice as a member of the City Council, with respect to whether The Conway Corporation should consider rejecting Construction Engineers, Inc.'s bid for cause. In view of CEI's reputation in the community regarding its ability to properly construct, conclude and manage a construction project, primarily my first hand knowledge of its mismanagement of the Florence Mattison School Project in Conway, I advised Mr. Brewer that, in my opinion, as a member of the City Council of Conway, Arkansas, it would be a mistake to award the contract for the construction of the Gleason Project to Construction Engineers, Inc.

3. I know that, at the time of conversations with Mr. Brewer, he had not prejudged the issue. He was acting in good faith at all times and had not decided what his recommendation to the Board of Directors of the Conway Corporation would be with respect to the matter. Mr. Brewer discussed the bid award issue with me and other members of the City Council for the purpose of acquiring our guidance and advice in deciding upon the best course of conduct to follow in connection with selecting a contractor.

DATED this 9 day of March, 1988.

WOODROW CUMMINS

SUBSCRIBED AND SWORN to before me,
a Notary Public, on this 9 day of March, 1988.

WILLIAM M. HEGEMAN

My Commission Expires 2-1-1993

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS

Construction Engineers, Inc.

Plaintiff

vs.

No. 86-3687

The Conway Corporation, M. D. Limbaugh
Construction Co., Jim Brewer, Bennie J.
McCoy, John Doe I, John Doe II, and
Defendants Larry Graddy, Frank Robins, III,
Luke Gordy, Bill Pate, Bob Clifton, and
Leo Crafton III, as Members of the Board of
Directors of The Conway Corporation,

Defendants

AFFIDAVIT

KNOW ALL MEN BY THESE PRESENTS:

That I, William L. Wright, a resident of

Conway, Arkansas, having first been duly sworn, state on oath as follows:

1. I am a former Mayor of the City of Conway, Arkansas, and was serving in that capacity in 1986. I served as Mayor for a period of 8 years. In my capacity as Mayor of the City of Conway, I had discussions with James H. Brewer of The Conway Corporation in late June and early July of 1986, during which time the Conway Corporation was in the process of selecting a contractor to perform construction work in connection with the expansion of the Gleason Plant in Conway.

2. In our conversations, Mr. Brewer sought advice from me as Mayor of the City of Conway, with respect to whether The Conway Corporation should consider rejecting Construction Engineers, Inc.'s bid for cause. In view of my knowledge of CEI's reputation in the community regarding its ability to properly construct, conclude and manage a construction project, primarily my first hand knowledge of its mismanagement of the Florence Mattison School Project in Conway, I advised Mr. Brewer that, in my opinion, as Mayor of the City of Conway, Arkansas, it would be a mistake to award the contract for the construction of the Gleason Project to Construction Engineers, Inc.

3. I know that, at the time of my conversations with Mr. Brewer, he had not prejudged the

issue. He was acting in good faith at all times and had not decided what his recommendation to the Board of Directors of the Conway Corporation would be with respect to the matter. Mr. Brewer discussed the bid award issue with me and other members of the City Council for the purpose of acquiring our guidance and advice in deciding upon the best course of conduct to follow in connection with selecting a contractor.

DATED this 7th day of March, 1988.

WILLIAM L. WRIGHT

SUBSCRIBED AND SWORN to before me,
a Notary Public, on this 7th day of March, 1988.

BETTY K. PEDEN

My Commission Expires May 6, 1991

**IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS**

Construction Engineers, Inc.

Plaintiff

vs.

No. 86-3687

The Conway Corporation, M. D. Limbaugh
Construction Co., Jim Brewer, Bennie J.
McCoy, John Doe I, John Doe II, and
Defendants Larry Graddy, Frank Robins, III,
Luke Gordy, Bill Pate, Bob Clifton, and
Leo Crafton III, as Members of the Board of
Directors of The Conway Corporation,

Defendants

AFFIDAVIT

KNOW ALL MEN BY THESE PRESENTS:

That I, Jerry L. Maulden, a resident of Little Rock, Arkansas, and President and Chief Executive Officer of Arkansas Power & Light Company having been first duly sworn, state on oath as follows:

1. I have known James H. Brewer, General Manager of The Conway Corporation and a resident of Conway, Arkansas, for approximately 20 years. I, of my own personal knowledge, know Mr. Brewer's reputation

for truth and veracity to be unimpeachable. His character is above reproach and in his dealings with others, he has always acted fairly and honestly.

2. I have never known Mr. Brewer to commit any act in bad faith or to otherwise unfairly deal with anyone in any of his business dealings, or otherwise.

3. Because of my knowledge of Mr. Brewer's high character I would unquestionable take his word at face value.

DATED this 7th day of March, 1988.

JERRY L. MAULDEN

SUBSCRIBED AND SWORN to before me,
a Notary Public, on this 7th day of March, 1988.

BETTY K. PEDEN

My Commission Expires May 6, 1991

**IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS**

Construction Engineers, Inc.

Plaintiff

vs. No. 86-3687

The Conway Corporation, M. D. Limbaugh
Construction Co., Jim Brewer, Bennie J.
McCoy, John Doe I, John Doe II, and
Defendants Larry Graddy, Frank Robins, III,
Luke Gordy, Bill Pate, Bob Clifton, and
Leo Crafton III, as Members of the Board of
Directors of The Conway Corporation,

Defendants

AFFIDAVIT

KNOW ALL MEN BY THESE PRESENTS:

That I, David Harrington, a resident of Little Rock, Arkansas, and Director of the Arkansas Industrial Development Commission, having been first duly sworn, state on oath as follows:

1. I have known James H. Brewer, General Manager of The Conway Corporation and President of the Arkansas Industrial Development Foundation, for many years. I, of my own personal knowledge, know Mr.

Brewer's reputation for truth and veracity to be unimpeachable. His character is above reproach and in his dealings with others, he has always acted fairly and honestly.

2. I have never known Mr. Brewer to commit any act in bad faith or to otherwise unfairly deal with anyone in any of his business dealings, or otherwise.

3. Because of my knowledge of Mr. Brewer's high character I would unquestionable take his word at face value.

DATED this 7th day of March, 1988.

DAVID HARRINGTON

SUBSCRIBED AND SWORN to before me,
a Notary Public, on this 7th day of March, 1988.

CHERRY DUCKETT

My Commission Expires 9-18-89

IN THE SUPREME COURT OF ARKANSAS

The Conway Corporation, M. D. Limbaugh
Construction Co., Jim Brewer, Bennie
J. McCoy, John Doe I, John Doe II and
Defendants Larry Graddy, Frank Robins, III,
Lou Gardy, Bill Pate, Bill Clifton, and
Leo Crafton, III, as members of the Board
of Directors of the Conway Corporation

*Appellants/
Cross Appellee*

vs. No. 89-34

Construction Engineers, Inc., Associated
General Contractors of America, Arkansas
Chapter, Michael Sutterfield and
Catherine N. Rushing

*Appellee/
Cross Appellant*

PETITION FOR REHEARING

Comes now the Appellee, Construction
Engineers, Inc., by and through its attorney, David A.
Orsini, and for its Petition for Rehearing states:

1. This Court has denied Construction
Engineers, Inc., the Appellee (hereinafter "CEI") the

right to due process of law protected by the Fourteenth Amendment to the Constitution of the United States.

A. CEI was denied the right to a fair trial by this Court's action in reversing and dismissing Appellee's causes of action, after trial *de novo*, with the Court's action being based almost entirely upon proffered affidavits and proffered testimony. No opportunity to object to inadmissible testimony or for cross examination existed as to either class of proffered testimony. This Court has thus prevented CEI from cross examining witnesses, and from having the opportunity to object to inadmissible testimony. CEI was denied its right to effective counsel by its lack of opportunity to object, to cross examine, or participate in any manner with regard to matters proffered below and then relied upon by this Court. These rights are fundamental rights which are protected by the Fourteenth Amendment and 42 U.S.C. §1983. Denial of these rights is a denial of both substantive and procedural due process rights. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 1187 (1965) (fundamental requirement of due process is opportunity to be heard at meaningful time and meaningful manner); *Adington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (function of legal process is to minimize risk of erroneous decisions); *Council of Federal Organizations v. Mize*, 339 F.2d 898 (5th Cir. 1964) (right of litigant to be heard is one of fundamental rights of

due process); *Derewecki v. Pennsylvania R.R. Co.*, 353 F.2d 436 (3d Cir. 1965) (denial of right of cross examination of available witness deprives litigant of due process); *Ellis v. Capps*, 500 F.2d 225 (5th Cir. 1974) (denial of right of inquiry such as bias and prejudice of party is repugnant to principle of fair trial); *See, U.S. v. Dinitz*, 538 F.2d 12.4 (5th Cir. 1976), *cert. den.* 429 U.S. 1104, 77 S.Ct. 1133, 51 L.Ed.2d 556 (1977) (refusal to hear party by counsel in civil or criminal case constitutes denial of a hearing and therefore due process); *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719 (4th Cir. 1961), *cert. den.* 368 U.S. 825, 82 S.Ct. 44, 7 L.Ed.2d 1981 (preparation of court's opinion by litigant's counsel without notice to opposing side amounts to denial of due process); *Bagby v. Beal*, 439 F.Supp. 1257 (M.D. Pa. 1977), *vac. as moot* 606 F.2d 411 (3d Cir. 1979) (due process includes a reasonable opportunity to be heard, including a statutory scheme which is intelligible to persons affected by it).

B. The proffered testimony of Appellants, Conway Corporation, Inc., Jim Brewer and all defendants except McCoy, consisting of statements of Dan Nabholz on the issue of *liability* was tendered *during the damage portion* of a bifurcated trial. No opportunity to cross examine or object to inadmissible testimony was given because only a proffer was being made. During the trial to determine liability, Appellants Conway Corporation, Inc. and James Brewer participated fully. Upon concluding their defense on liability, these defendants

rested. The trial court ruled on the liability issue. Only after having the opportunity to know the basis for the liability ruling of the trial court, an opportunity to see after the fact what issues might be deemed most significant, did Appellants Conway Corporation, Inc. and Jim Brewer proffer the testimony of Dan Nabholz and affidavits relied upon by this Court. It should be noted that the affidavits of all appellants except McCoy were presented *after all* testimony in the *entire trial* was concluded. This Court's allowance of this untimely evidence and reliance upon it without permitting cross examination, or the right to object, and to the exclusion of the trial testimony, deprived Appellee, CEI of the fundamental right to a fair trial.

C. As shown by the abstracted material beginning on page 112, the proffer of Brewer admits the trial court has decided liability and ruled further evidence of liability was to be inadmissible during the trial on damages. No confusion existed in these appellants' minds as to the evidence to be presented at either trial. The proffer states it is a proffer on *liability* by way of affidavits. Because the proffer was untimely, and because it was by affidavit, and because all testimony was concluded and the affidavits were not presented until the trial was concluded, there was no opportunity for cross examination, for objection such as to hearsay, or for any participation by counsel for Appellee. Because this Court now credits this proffered testimony, these omissions seriously prejudice CEI's right to a fair trial,

when such evidence, without right to trial, was considered and relied upon by this Court. For example, the affidavit of Elaine Goode, accepted by this Court as true, contains hearsay and hearsay within hearsay. Her testimony would not have been admissible if she had appeared in a timely manner and attempted to testify. Such error demonstrates the seriousness of the deprivation of due process. The proffer (Ab. 112, 113, 114, Tr. 863, 864) offers more testimony of Carl Stewart on the issue of liability when, in fact, Mr. Stewart had already testified and given testimony damaging to appellants on cross examination. The proffer, made after conclusion of the trial, is an untimely attempt to bolster trial testimony without allowing further cross examination. For the Court on trial *de novo* to rely upon such affirmations and in effect allow its admission into evidence as evidence post trial, has resulted in an entirely new trial in which CEI was not allowed to participate. The affidavit of Jim Brewer offers more testimony on the issue of liability although Appellant Brewer had testified during the trial. This time, however, the affidavit asserts hearsay and further summaries of his version of events without cross examination or the opportunity to object to hearsay. The affidavits of the other individuals in the post trial proffer were, of course, untimely and offered on the issue of liability. No explanation was given for not offering this testimony in a timely manner during the liability portion of the trial. Some of the affidavits are based on hearsay, some express opinions upon the ultimate conclusion of good faith/bad faith; however, most are contrary to

Appellant Brewer's testimony as to whom he discussed problems with and what he was told. (Ab. 312, Tr. 2364, 2541) These defects demonstrate the extent of harm to CEI's right to due process, such harm resulting in a complete denial of a right to procedural and substantive due process caused by the lack of opportunity to object, the lack of opportunity to cross examine, and the lack of meaningful participation of counsel to challenge the evidence or offer counter testimony, or to impeach the testimony.

D. Appellant McCoy proffered certain testimony by affidavit as shown beginning on (Ab. 242, Tr. 2992, 2993). He proffers the affidavit of William J. Driggers, Sr. Not only is the proffer untimely, but the proffer of this witness shows it is in effect an attempt to substitute the witness for the trial judge. This affiant states he reviewed the deposition of McCoy and was given general information in the lawsuit. Having qualified himself as a judge, this affiant finds that Appellant McCoy did not act in bad faith. While the rules permit some comment by witnesses upon the ultimate issue, this testimony would not have been admissible. Cross examination certainly would have disclosed the basis upon which this witness was relying and would have disclosed any errors or misinformation he had been furnished in forming his opinion as a judge. Without cross examination and without the right to object, CEI had no trial on this portion of the evidence.

The same is true of the affidavit of Robert Schultz. Although Mr. Schultz is an attorney, his testimony should have been subject to cross examination. It should have been timely presented and the basis upon which he was relying could have been exposed as to any weaknesses.

The trial *de novo* of this Court has allowed the introduction as evidence of untimely affidavits, which were a mere proffer of proof. It is error to admit evidence that is as untimely as is the proffer here. The Court has credited the affidavits and the proffer of Dan Nabholz liability testimony over 6 days of trial testimony together with supporting exhibits by all parties. The Court has thus excluded CEI from participating in the only part of the trial this Court finds significant. The Court has denied CEI its right to trial and to due process of law.

2. In finding the chancellor's findings of bad faith clearly erroneous, the affect of the Court's reliance upon the untimely proffers of proof, conclusively demonstrates the prejudice to CEI. At the same time, the Court failed to give proper weight to the evidence which *supports* the chancellor's findings. For example, the chancellor found CEI was qualified to build the project. This finding is not challenged. Defendant McCoy testified the quality of CEI's work was not being questioned. (Ab. 288, Tr. 2430) While this testimony is overlooked by the Court, it is directly contrary to the

allegations of poor workmanship in the affidavits. Further, the allegations of poor workmanship in the affidavits is contrary to the school architect's testimony, which architect testified for the appellants. He placed the blame for problems on his own specification and on trouble with subcontractors. (Ab. 310, 311, Tr. 2535, 2536) He did not state poor workmanship was one of the problems.

Most significant is the trial testimony of appellant Brewer shown on Ab. 312:

My concerns with regard to CEI were based on my knowledge and understanding of the problems they had with coordinating work of subcontractors on the Mattison School project and some problems that seemed to be apparent with the Morrilton sewer project. I read *newspaper* articles and discussed through the years with *members* of the *school board* and *superintendent* of the School. (Ab. 312)
(Emphasis added)

This proffer of testimony which indicates problems with subcontractors was consistent with the testimony of the architect Dan Stowers as to subcontractor coordination. It is, however, inconsistent with the matters set forth in the affidavits. No mention at trial was made of discussion with city council members or a mayor. The plain truth of the matter is that the

affidavits are so full of hearsay and of information that cannot be substantiated, the testimony would not have been admissible in a large part, and any remaining parts would have been incredible.

The evidence to support the findings of the chancellor are set out in the abstract and brief of Michael Sutterfield and Catherine Rushing, beginning on Page 6 and will not be repeated in this petition. However, such matters are incorporated herein by reference and clearly demonstrate the chancellor's finding is not clearly erroneous.

The trial *de novo* conducted by the Court in the instant case abandons the standards set forth in *Looper v. Madison Guaranty Savings & Loan Association*, 292 Ark. 255, 79 S.W.2d 156 (1987). In *Looper*, the Court held it does not retry cases, but sits as an appellate court. In the instant case, the Court has in fact retried the case *de novo*. In *Looper* a holding was made that the appellate court does not consider what it would have done, but whether discretion was abused. This Court abandons that standard and substitutes its own decision as to what should have been done.

By way of example, while the Court's opinion purports to demonstrate error in the chancellor's findings regarding McCoy's reliance on the Conway County Water Plant structure, the Court omits appellant McCoy's testimony which states Brewer was aware of the

problem in *May*:

Before the China trip, Mr. Brewer expressed his concerns. . . . It was in those early conversations with Mr. Brewer that the Conway County Water Distribution project in May was mentioned. (Ab. 288)

No question came up about the structure until the first of August. (Ab. 355, Tr. 1133) The testimony of the engineer Threet was to the effect he did not recall discussing the structure with McCoy, meaning he *did not do so*. Drawing all inferences in favor of the testimony to support the chancellor's findings, testimony and the record and inferences support the chancellor. This Court, however, abandons *Looper* by examining evidence contrary to the trial court's finding rather than the evidence and inferences which support that finding.

3. I, David A. Orsini, certify that it is my belief that there is merit in this petition and that it is not filed for the purpose of delay.

CONCLUSION

We respectfully submit that the foregoing justifies the granting of this Petition for Rehearing and trust that the Court will agree.

Respectfully submitted,

DAVID A. ORSINI

Attorney for Appellee

212 Center Street, Suite 700

Little Rock, Arkansas 72201

(501) 376-4242

IN THE SUPREME COURT OF ARKANSAS

The Conway Corporation, M. D. Limbaugh
Construction Co., Jim Brewer, Bennie
J. McCoy, John Doe I, John Doe II and
Defendants Larry Graddy, Frank Robins, III,
Lou Gardy, Bill Pate, Bill Clifton, and
Leo Crafton, III, as members of the Board
of Directors of the Conway Corporation

*Appellants/
Cross Appellee*

vs. No. 89-34

Construction Engineers, Inc., Associated
General Contractors of America, Arkansas
Chapter, Michael Sutterfield and
Catherine N. Rushing

*Appellee/
Cross Appellant*

PETITION FOR REHEARING

Comes now the Appellee, Associated
General Contractors of America, Arkansas Chapter and
Intervenors, Michael Sutterfield and Catherine N.
Rushing, by and through their attorneys, and for their
Petition for Rehearing state:

1.

The Petition for Rehearing of Construction Engineers, Inc. is adopted in its entirety by these appellees and is incorporated herein by reference.

2.

The denial of due process by this Court's action is more fundamental as to Associated General Contractors of America, Arkansas Chapter, (hereinafter "AGC") for the reason that the AGC, although a full party, was excluded from participating in the damage portion of the trial wherein the proffer of Nabholz's testimony was made, and appellant McCoy's proffer was made. Of course, the affidavits of all defendants except McCoy were not made until even after conclusion of that trial. AGC and its counsel were excluded on motion of appellants, which motion objected to AGC and its counsel participating in the trial on damages since only issues of damages were to be heard, a matter in which the AGC had no interest.

The affidavits and proffers upon which this Court relies to reverse the liability holding and the finding of bad faith are matters upon which AGC and Intervenor, Sutterfield and Rushing have been denied their day in court.

3.

I, Janice Vaughn, certify that it is my belief that there is merit in this petition and that it is not filed for the purpose of delay.

Respectfully submitted,

JANICE VAUGHN
WALLACE, DOVER & DIXON
425 W. Capitol Street
Suite 3800
Little Rock, Arkansas 72201
*Attorney for Associated General
Contractors of America,
Arkansas Chapter*